Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

In re LOUIS F. ALLEN, *et al.*, *Petitioners*

Petition for a Writ of Mandamus [redacted] to the United States Court of Appeals for the Fourth Circuit and The Honorable Paul V. Niemeyer, M. Blane Michael and Diana Gribbon Motz, Circuit Judges

APPENDIX FOR PETITIONERS

A. Stephens Clay
Counsel of Record
Susan A. Cahoon
KILPATRICK & CODY, L.L.P.
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
(404) 815-6500

Counsel for Petitioners

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LOUIS F. ALLEN; CARL K. BAKER; JOYCE P. BAKER; PETER D. BERRINGTON; OLIVER BIRCKHEAD; FLORENCE BLAUSTEIN; MARY L. BRAY; T. K. BROOKER; DONALD J. BROOKS; JOSEPH CALLAGHAN; JAMES CASSEL; TERRY G. CHAPMAN; J. A. CLAWSON; JOHN K. COLVIN; FRED B. COX; JOHN RAWLYN CHARLES CRABTREE; CHRISTOPHER P. CLUP; GORDON C. DAVIDSON; RUTHERFORD DAY; DONALD D. DOTY; M. D. A. EMBLIN; AUDREY FISHER; DONALD B. GIMBEL; KENNETH J. GIMBEL; KATHERINE GOOCH; B. G. HARRISON; YUMIKO HONDA; HERBERT W. HOOVER, III; MARGARET W. JONES; DONALD K. KENT; E. R. KINNEBREW, III; WALTER J. LEVY; ROLAND LEY; SUZANNE RHULEN LOUGHLIN; GEORGE C. LYMAN, JR.; CHARLES P. LYON; MICHAEL L. MCDERMOTT; ROBERT T. MCINERNY; ARTHUR G. MICHELS; WALTER P. MUSKAT; WALTER W. MUSKAT; A. D. PISTILLI; ROBERT A. POSNER; JUDSON P. REIS; HARRY W. RHULEN; WALTER A. RHULEN; J. O. RICKE; E. JOY ROSE;

No. 96-2158

MARK S. ROSE; A. F. SMITH; OWN B. TABOR; ALLEN M. TAYLOR; TRUDE C. TAYLOR; KARL ARONSON; JOAN R. FARROW AND JONATHAN M. FARROW FOR THE ESTATE OF JESSE M. FARROW; JACK FLECK; MARILYN FRANCKX; ISABEL L. GALLAGHER; JENNIFER A. GALLAGHER; MARY CLAIR GALLAGHER; ROBERT E. GALLAGHER; ROBERT E. GALLAGHER, JR.; THOMAS J. GALLAGHER; THOMAS H. GREEN; HENRY G. HAGER; THORNTON HUTCHINS; VINCE A. KONEN; C. C. LUCAS; HERBERT A. MIDDENDORFF; ROBERT S. DENEBEIM; DANA FISHER, SR.; WILLIAM ALEXANDER FLORENCE; ANNE M. GALLAGHER; J. PATRICK GALLAGHER; MARK E. GALLAGHER; MARY CLAIRE GALLAGHER AS EXECUTRIX FOR JOHN P. GALLAGHER; KATHERINE GALLAGHER GOESE; ALLEN S. GREEN; ROBERT W. HATCH; MARY CLAIR G. JOHNSON; THOMAS V. LEEDS; GUY A. MAIN; EUGENE F. MIDDLEKAMP; MICHAEL MONTANA; BARBARA H. PISANI; RICHARD B. SANDERS; JACK R. TAYLOR; KEN NOACK; ROBERT L. PISANI; LARRY D. STROUP; NEVILLE G. WILLIAMS,

Plaintiffs-Appellees,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a Society and Council of Lloyd's; COUNCIL OF LLOYD'S,
Defendants-Appellants.

and

EQUITAS HOLDINGS LIMITED; EQUITAS REINSURANCE LIMITED; EQUITAS LIMITED, a/k/a Equitas or Equitas Group,
Defendants.

ASSOCIATION OF LLOYD'S MEMBERS; GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND; NATIONAL ASSOCIATION OF INSURANCE BROKERS; CALIFORNIA INSURANCE COMMISSIONER.
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(CA-96-522)

Argued: August 27, 1996

Decided: September 3, 1996

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Michael and Judge Motz joined.

COUNSEL

ARGUED: Harvey L. Pitt, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York, for Appellants. Alexander Stephens Clay, IV, KILPATRICK & CODY, Atlanta, Georgia, for Appellees. **ON PLEADINGS:** Michael H. Rauch, Bonnie Steingart, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York; Cynthia T. Andreason, LEBOEUF, LAMB, GREENE & MACRAE, L.L.P., Washington, D.C.; Henry H. McVey, Warren E. Zirkle, Darryl S. Lew, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellants. Richard R. Cheatham, Susan A. Cahoon, Stephen E. Hudson, Christopher B. Lyman, KILPATRICK & CODY, Atlanta, Georgia; Conrad M. Shumadine, Walter D. Kelley, Jr., WILLCOX & SAVAGE, Norfolk, Virginia, for Appellees. Timothy M. Kaine, Rhonda M. Harmon, MEZZULLO & MCCANDLISH, Richmond, Virginia, for Amicus Curiae Association of Lloyd's Members. Mark R. Joelson, Joseph P. Griffin, Thomas J. O'Brien, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, D.C., for Amicus Curiae United Kingdom. Ronald A. Jacks, David M. Spector, MAYER, BROWN & PLATT, Chicago, Illinois, for Amicus Curiae NAIB; Martin Shulman, Paul H. Falon, MANATT, PHELPS & PHILLIPS, L.L.P., Washington, D.C.; Richard A. Brown, Leonard D. Venger, Donald R. Brown, MANATT, PHELPS & PHILLIPS, L.L.P., Los Angeles, California; William W. Palmer, General Counsel, CALIFORNIA DEPARTMENT OF INSURANCE, San Francisco, California, for Amicus Curiae Insurance Commissioners.

OPINION

NIEMEYER, Circuit Judge:

In 1995, Lloyd's of London announced a $22 billion "Plan for Reconstruction and Renewal" to restructure the Lloyd's market's reinsurance needs and to revitalize the market. The Plan included an offer by Lloyd's managers to settle, for $4.8 billion, all intra-market disputes, including existing and potential lawsuits by "Names," members of the Lloyd's market who underwrite insurance there. Ninety-

three American Names filed this action in the Eastern District of Virginia under United States securities laws to compel Lloyd's to disclose more financial information about its proposed plan. The Names also sought a preliminary injunction prohibiting Lloyd's from forcing American Names to make "an irrevocable election respecting their investment" by an August 28, 1996 deadline established by Lloyd's.

Applying United States securities laws, the district court granted the Names' motion for a preliminary injunction on August 23, 1996. The court directed Lloyd's to make disclosures as required by § 14(a) of the Securities Exchange Act of 1934 by September 23, 1996, and prohibited Lloyd's from taking steps to collect any amounts from American Names pending completion of the disclosure and review process. The court also scheduled a trial on the merits for November 4, 1996.

Lloyd's appealed the district court's preliminary injunction and sought expedited review because Names wishing to accept the settlement proposal that Lloyd's offered as part of its Plan were required to advise Lloyd's of their decision by noon on August 28, 1996. We scheduled oral argument for August 27, 1996, and, following argument, entered the following order from the bench, reversing the district court:

> On the motion of appellants to stay the district court's injunction entered August 23, 1996, and upon consideration of the briefs, papers, and extensive arguments of counsel, the court grants the motion. Because the court's decision rests on its determination, to be articulated in a later opinion, that the contractual provisions among the parties selecting the law of and a forum in the United Kingdom should be enforced, we reverse and remand this case with instructions that the district court dismiss it.

This opinion provides the reasoning for our order.

I

Lloyd's of London manages an insurance market that was created over 300 years ago in a London coffee shop to insure shipping risks.

The market today is a large, complex arrangement under which "Names," who as members of the Society of Lloyd's become members in the market, join individual underwriting syndicates formed to insure a broad range of risks. Managing agents assemble the syndicates, collect premiums from the insureds, assess the Names, manage the risks, and provide annual accountings to the Names. The underwriting capital for each syndicate is supplied by cash advanced by the Names, and excess losses — those that exceed the premiums paid — are insured by the Names' commitment to pay losses from their personal assets "down to their last cufflinks." The integrity of the market is also assured by a Central Fund, created from assessments of Names, which the market's managing body, the Council of Lloyd's, controls and maintains to disburse to insureds when Names default.

The Lloyd's market is governed by a series of acts of Parliament, enacted over the last 100 years, authorizing the Council of Lloyd's to adopt rules and bylaws to regulate the market. As a condition of their membership in the Society, Names are required to execute a "General Undertaking," by which they agree to comply with the controlling acts of Parliament as well as the rules and bylaws of Lloyd's.

Over 34,000 Names from 80 different countries participate in the Lloyd's market: 3,000 Names are Americans. While individuals are solicited in countries other than the United Kingdom, each prospective Name is required to travel to London to participate in a personal interview during which the Name's financial commitment is explained. Names are advised that they undertake unlimited personal liability for their respective shares of the risks insured by the policies they underwrite and that they cannot resign from the market until all such obligations have been discharged. They are also advised that any disputes over their participation in the market must be resolved in British courts according to British law.

The Lloyd's market operates under a three year accounting cycle. At the end of the third year after a syndicate is formed, underwriting profits and losses for each syndicate year are calculated, and the estimated liabilities are routinely reinsured by another syndicate. Through this process, Lloyd's reinsures undischarged risks to close the account. When the magnitude of potential liabilities for a syndicate cannot reasonably be estimated at the end of three years, the syn-

dicate cannot reinsure them, and the participating Names remain liable on their undertaking.

During the late 1980's and early 1990's, unanticipated losses from asbestosis and pollution claims, together with a string of catastrophic events such as Hurricane Hugo and the bombing of Pan Am Flight 103, caused losses far greater than the amounts of premiums that had been collected. By Lloyd's estimation, the excess losses for the years before 1993 will total approximately $22 billion.

As losses mounted, intra-market disputes arose. Names accused managing agents and underwriters of mismanagement in assessing risks and even fraud in assessing and disclosing the risks to Names choosing syndicates. A considerable number of Names also became unable or unwilling to satisfy their obligations and began to incur debts to the Central Fund, and the ensuing litigation made it difficult for the Central Fund to collect from non-paying Names. The integrity and viability of the entire Lloyd's market was thus called into doubt.

To restore the integrity of its market, Lloyd's embarked on a massive and complex effort to develop a restructuring plan. After three years and the expenditure of over $100 million, Lloyd's issued a Plan for Reconstruction and Renewal with two gross components: (1) the settlement of intra-market litigation whereby Names release all claims against Lloyd's and its various market participants in exchange for $4.8 billion in credits and (2) the reinsurance of Names' pre-1993 underwriting obligations by a newly formed company, Equitas Reinsurance Ltd. Under the Plan, Equitas' capital is to be funded by loans, a cash call on Names, and the $4.8 billion in credits assembled by Lloyd's for the settlement of the Names' claims.

Lloyd's circulated its Plan and offered each Name the opportunity to settle with Lloyd's for a specified share of the settlement funds. The Plan provides that if enough Names agree to settle, those Names who do not agree will nevertheless be forced to contribute capital to Equitas through assessments authorized by their original commitment to Lloyd's. Under the Plan, any capital that remains after Equitas has satisfied all outstanding pre-1993 obligations will be returned to the Names. Lloyd's offered its settlement with Names subject to the condition that Names respond by August 28, 1996, a deadline that

Lloyd's claims was necessary because the continued solvency of its market is in jeopardy and the season for underwriting reinsurance traditionally begins in the fall.

The 93 American Names who have demanded more information about the Plan filed suit in the Virginia district court, claiming that Lloyd's was denying them disclosure rights guaranteed by United States securities laws. Lloyd's moved to dismiss the complaint on the ground that the Names had agreed to litigate all disputes relating to the Lloyd's market in the United Kingdom under British law. The district court denied Lloyd's motion. Applying United States securities laws, the court also enjoined Lloyd's from demanding settlement from the American Names without providing the disclosures required by the securities laws and ordered that Lloyd's provide such disclosures within 30 days. This appeal followed.

II

In reversing the district court by our August 27, 1996 order, we determined that "the contractual provisions among the parties selecting the law of and a forum in the United Kingdom should be enforced." Those contractual provisions, which appear in the General Undertaking between Lloyd's and the Names, specify that "any dispute and/or controversy of whatsoever nature arising out of or relating to" Names' participation in Lloyd's be submitted to the exclusive jurisdiction of the British courts and that British law govern all matters referred to in the General Undertaking, including the parties' "rights and obligations . . . arising out of or relating to" the Names' participation in Lloyd's.

Since its seminal decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity, rejecting the "parochial concept" that "notwithstanding solemn contracts . . . all disputes must be resolved under our laws and in our courts." *Id.* at 9; *see also Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2329 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). But the presumption of en-

forceability that forum selection and choice of law provisions enjoy is not absolute and, therefore, may be overcome by a clear showing that they are " 'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10. Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state. *See Carnival Cruise Lines*, 499 U.S. at 595; *The Bremen*, 407 U.S. at 12-13, 15, 18.

In determining whether any of the foregoing circumstances apply in this case to preclude enforcement of the parties' choice of forum and law, the district court first observed that "there is no contention by the Names that they were fraudulently induced into agreeing to the forum selection or choice of law clauses." Nor did the court believe it " 'gravely inconvenient' for the Names to litigate in England." Noting that "United States courts have consistently found English tribunals to be neutral and just," the district court further found that the "plaintiffs would not be effectively 'denied their day in court' were they forced to present their claims in front of an English tribunal." But applying the last basis for unreasonableness, the court denied enforcement to the parties' choice of forum and law provisions on the ground that they subverted a strong public policy of the United States—namely, the unwaivable investor protections provided by the American securities laws' disclosure requirements.

Although we agree with the district court that the first three bases for finding unreasonableness do not apply here, we disagree with its conclusion that the public policy underlying the United States securities laws justify denying enforcement of the parties' choice of forum and law clauses.

III

By adopting a policy of full disclosure of relevant information to replace the doctrine of *caveat emptor*, the United States securities laws play a critical role in sustaining honest and efficient domestic

capital markets. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963). Indeed, the United States securities laws prohibit attempts to waive their disclosure requirements. *See* 15 U.S.C. §§ 77n, 78cc(a). But the question remains in this case whether the choice of forum and law clauses to which the Names agreed when entering the Lloyd's insurance market implicate the anti-fraud and disclosure policies that underlie the United States securities laws to the extent that those clauses cannot be enforced.

We do not believe that enforcing the parties' forum selection and choice of law provisions in this case will subvert the United States securities laws' policy of prohibiting *fraud*. British law not only prohibits fraud and misrepresentations as do the United States securities laws, but also affords Names adequate remedies in the United Kingdom. *See Shell v. R.W. Sturge Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1365 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992). Under British law, the Names could bring claims based on the tort of deceit, breach of contract, negligence, and breach of fiduciary duty, and could obtain injunctive, declaratory, rescissionary, and restitutionary relief. *See Shell*, 55 F.3d at 1230-31. And "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement." *Riley*, 969 F.2d at 958.

Moreover, we do not believe that Congress intended that the *disclosure* requirements of the United States securities law be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (finding language of Securities Exchange Act "too inconclusive" to find that "Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security"). "[C]onfronted with [a] transaction that on any view [is] predominantly foreign, [we] must seek to determine whether Congress would have wished the precious resources of United States

courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

For over 300 years, Lloyd's has been regulating an insurance market in London where members underwrite risks which are pooled into syndicates and managed by agents. While Lloyd's offers membership in the market to persons outside the United Kingdom, including Americans, syndicates are formed and managed at the market. When an individual from a country other than the United Kingdom is solicited for membership, market rules require that he travel to London for a personal interview. The would-be Name is provided with written materials advising him that he will be joining underwriting syndicates formed in London to insure risks from around the world under laws adopted by Parliament and bylaws promulgated by Lloyd's regulators. Prospective Names are also informed of the commitment of membership, which requires that Names have sufficient means committed to the market in London.

Relieving Names of their agreements is not justified in these circumstances simply because solicitation for membership in the market occurs in the United States. Membership solicitation is incidental to the formation of underwriting syndicates and the management of risks, all of which occur in London. Moreover, when members are solicited for membership, they are not solicited to join particular syndicates or to underwrite identified risks. Those matters are unknown until syndicates are actually created at the market. The United States nexus to the transactions involved in this case is thus incidental and tangential.

Although American courts have on occasion applied United States securities laws' anti-fraud provisions to predominantly foreign transactions, the "anti-fraud provisions of American securities laws have broader extraterritorial reach than American filing requirements." *Consolidated Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 262 (2d Cir. 1989). This is because "an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements." *Restatement (Third) of the Foreign Relations Law of the United States* § 416 cmt. a (1986).

To permit the Names to escape their agreements to be bound by the laws and rules of the British market just at a time when they face losses would also violate the most fundamental precepts of international comity. *See Consolidated Gold Fields*, 871 F.2d at 263 ("[A] court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity"). Imposing United States securities laws on this foreign market would directly contravene the very rules and regulations adopted in Britain for the creation and operation of the Lloyd's market to which the Names subscribed.

Finally, significant United States and foreign interests would be adversely affected if we were to insist that Lloyd's insurance underwriting syndicates comply with United States disclosure requirements. Such a ruling would place at risk billions of dollars of insurance coverage for United States citizens because American Names could demand rescission on the ground that their syndicates, even though they include citizens of various countries, did not comply with United States securities registration and disclosure requirements. Insurance commissioners from several states have described the potential mass confusion and damage to the domestic insurance market that such a ruling would cause.

In short, we conclude that enforcement of the Names' agreements to litigate disputes in the United Kingdom under British law does not contravene or undermine any policy of the United States securities laws. And we reach that same conclusion when we apply the specific provisions of the securities laws, to which we now turn.

IV

The Names advance two arguments to support their assertion that United States securities laws apply to the Lloyd's Reconstruction and Renewal Plan. First, they argue that the interests in Equitas offered by Lloyd's as part of the Plan are "investment contracts," subject to the disclosure and anti-fraud requirements of the 1933 and 1934 Acts. And second, they argue that their investments in Lloyd's pursuant to the General Undertaking are equity securities under the applicable securities acts and that the Plan is, therefore, a solicitation for "con-

sent or authorization in respect of [a] security," subject to the requirements of § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a).

To determine whether Lloyd's Plan constitutes an "investment contract" subject to the requirements of the securities laws, we apply the test announced in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). In *Howey*, the Supreme Court established that "an investment contract . . . means a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of [others]." *Id.* at 298-99. And the Court later instructed that the *Howey* test is to be applied with an eye to "the substance — the economic realities of the transaction — rather than the names that may have been employed by the parties." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851-52 (1975).

Focusing on the substance of the Plan before us, we discern two components: the settlement offer and the reinsurance through Equitas. The settlement component satisfies none of the *Howey* factors and, therefore, cannot make the Plan a security. And, whatever else might be said about the Equitas component, it does not satisfy the third *Howey* factor; none of the Names can expect to receive profits from their participation in Equitas. Indeed, the Plan creates Equitas solely to reinsure and discharge Names' preexisting obligations, not to underwrite new risks for profit. While Names may receive rebates should Equitas' initial capitalization ultimately prove greater than needed to discharge the Names' outstanding liabilities, such rebates are not profits, but rather a return of capital. *See Forman*, 421 U.S. at 854. Furthermore, Equitas is forbidden by its Articles of Association from paying dividends, and Lloyd's has indicated that, in the unlikely event that it generates profits by investing Equitas' capital during its operation, Lloyd's would donate such profits to charity. Because Lloyd's is not "induc[ing] purchases [in Equitas] by emphasizing the possibility of profits" or offering "profits [from Equitas] . . . in the form of capital appreciation or participation in earnings," *Teague v. Bakker*, 35 F.3d 978, 987 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1107 (1995), we readily conclude that no part of the Plan qualifies as a security for purposes of the securities laws.

We are similarly unpersuaded by the Names' second argument — that their initial investment in Lloyd's pursuant to the General Under-

taking is a security and that the Plan is, therefore, a solicitation for "consent or authorization in respect of [a] security" subject to § 14(a) of the 1934 Act. Section 14(a) makes it "unlawful for any person, by the use of . . . any means or instrumentality of interstate commerce . . . to solicit . . . any proxy or consent or authorization in respect of any [registered] security" in contravention of the rules and regulations prescribed by the Securities Exchange Commission. 15 U.S.C. § 78n(a). Although the parties vigorously dispute whether the Names' initial investment in Lloyd's qualifies as an "equity security" within the meaning of the Act, we need not resolve that issue because the Plan does not "solicit . . . any proxy or consent or authorization."

Section 14(a) embodies a policy of broad disclosure designed to protect the basic right of corporate suffrage. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 431-32 (1964); *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970); H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 13 (1934) ("Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange"). But not every communication from management to corporate shareholders amounts to solicitation under § 14(a). *Sargent v. Genesco*, 492 F.2d 750, 767 (5th Cir. 1974); *see also Brown v. Chicago, Rock Island & Pacific R.R.*, 328 F.2d 122, 125 (7th Cir. 1964); *see generally* 4 Louis Loss & Joel Seligman, *Securities Regulation* 1952 (3d ed. 1990) (listing examples of communications not covered by § 14(a) rules). Rather, it is only when management seeks consent or authorization for actions "requiring such approval" that § 14(a) steps in to ensure that approval is given with full knowledge. *Gaines v. Haughton*, 645 F.2d 761, 775 (9th Cir. 1981), *cert. denied*, 454 U.S. 1154 (1982); *see also Ash v. GAF Corp.*, 723 F.2d 1090, 1094 (3d Cir. 1983) (holding that "complainant must show that he suffered harm from the infringement of his corporate suffrage rights" to state a claim under § 14(a)); *cf. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (indicating that securities laws require accurate disclosure only of facts that would have assumed actual significance in a reasonable investor's decisionmaking).

Neither British law nor the General Undertaking signed by each Name grants Names any role in the decision to form and capitalize Equitas. Authorization to impose reinsurance through Equitas on the Names does not derive from their consent, but by virtue of a Lloyd's

bylaw passed in December 1995. Thus, the Plan is not a solicitation within the meaning of § 14(a).

Similarly, Lloyd's settlement offer is not subject to the disclosure requirements of § 14(a). The offer of settlement presents each Name with the choice of whether to waive his claim against Lloyd's and its agents in exchange for Lloyd's partial funding of his share of the Equitas premium. The Names have not presented, and we have been unable to find, any authority indicating that settlement offers in securities cases seek "consent or authorization in respect of [a] security," and we cannot conclude that Congress intended to bring all such communications within the purview of the securities laws.

V

In summary, the policies of the United States securities laws do not override the parties' choice of forum and law for resolving disputes in this case. Indeed, because Lloyd's Plan for Reconstruction and Renewal is neither a security nor a solicitation in respect of a security, the Plan is not regulated by the United States securities laws. For these reasons we vacated the district court's August 23, 1996 order by our August 27, 1996 order and remanded this case with instructions to the district court to dismiss the action.

REVERSED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

Filed Aug 23 1996
Clerk, U.S. District Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:96cv522

LOUIS F. ALLEN, *et al.*,

Plaintiffs,

v.

LLOYD'S OF LONDON, *et al.*,

Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the defendant's motion to dismiss is denied and the plaintiffs' motion for preliminary injunction is granted. A separate Order of injunction shall be entered.

The Clerk is directed to send a copy of this Order to all counsel of record and counsel for all amicus curiae.

It is so ORDERED.

/s/ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: August 23, 1996

APPENDIX C

Filed Aug 23 1996
Clerk, U.S. District Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:96cv522

LOUIS F. ALLEN, *et al.*,

Plaintiffs,

v.

LLOYD'S OF LONDON, *et al.*,

Defendants.

ORDER OF PRELIMINARY INJUNCTION

I.

For the reasons set forth in the accompanying Memorandum Opinion, the Court finds that:

(1) Plaintiffs will suffer irreparable harm if their motion for a preliminary injunction is denied;

(2) The irreparable injury that plaintiffs and the other American Names would suffer if their motion is denied significantly outweighs any demonstrated harm to Lloyd's of complying with its obligations under the securities laws of the United States; and

(3) Requiring Lloyd's to comply with its obligations under the U.S. securities laws would serve the public interest in full disclosure.

(4) The plaintiffs have met the test of *Direx Israel, Ltd. v. Medical Breakthrough Corp.*, as to their claims that:

(a) The investments in Lloyd's pursuant to their General Undertaking are "securities" within the meaning of § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77(b)(1) and § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) which are subject to registration under § 12(g). (1) of the 1934 Act because the investments are equity securities within the meaning of § 3(a)(11) of the 1934 Act, 15 U.S.C. § 78c(a)(11) and because Lloyd's has more than 500 Names and total assets of more than $10 million.

(b) Lloyd's is in violation of §14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a); and that in seeking Names' consent to the Settlement Offer dated July 26, 1996, Lloyd's is using the U.S. mail and other means or instrumentalities of interstate commerce to solicit a "proxy or consent or authorization" from the plaintiffs and the other American Names in contravention of rules and regulations promulgated by the Securities and Exchange Commission (the "SEC"), and in particular, SEC Rules 14a-3 and 14a-9.

(5) Those entitled to the protection of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) include, but are not limited to, the individually named plaintiffs in this action and those plaintiffs sought to be added by motion. There are approximately 3000 American Names entitled to the disclosures and opportunity for considered reflection provided under the applicable securities law of the United States before deciding whether to accept or reject Lloyd's Settlement Offer.

(6) Some American Names have expressed support for Lloyd's July 26 Settlement Offer. This Court's object, and the mandate in this Circuit, is to formulate injunctive relief that offers the protection Congress has assured without imposing unwarranted restrictions on those Names who choose not to avail themselves of such protection.

(7) Further, Lloyd's is entitled to as much latitude in continuing with its Reconstruction & Renewal plan as is consistent with the enforcement of the federal securities laws applicable to Lloyd's efforts to raise capital for Equitas in the United States.

II.

In recognition of these different interests and mindful of the strictures on preliminary injunctive relief in this Circuit, and for the reasons set forth in paragraphs I above and in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Lloyd's is enjoined from imposing on any American Name the terms and conditions set forth in Lloyd's Settlement Offer Document dated July 26, 1996, except as set forth hereinafter.

(2) Lloyd's shall forthwith send a copy of this Order to every Name who resides in the United States; provided, however, that the expense thereof shall be borne initially by plaintiffs subject to recoupment in any bill of costs.

(3) Not later than September 23, 1996, Lloyd's shall make disclosures to the American Names as required by § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and all applicable SEC regulations promulgated thereunder.

(4)(a) Any American name who elects to avail himself or herself of the opportunity to review the disclosures provided pursuant to paragraph (3) before responding to Lloyd's Settlement Offer of July 26, 1996 shall have the right and option to do so without prejudice to, or adverse effect on, their ultimate decision whether to accept or reject that offer on its current terms.

(b) In order to facilitate the orderly, efficient, fair and expeditious administration of justice and in order to preserve the status quo to the extent possible and the jurisdiction of the court and at the agreement of counsel for the plaintiffs, American Names who desire to take advantage of subparagraph (a) shall pay the full amount indicated in their Finality Statement [the line from the Finality Statement Summary — July 1996, which states: "Finality (cost/surplus taking into account funds at Lloyd's"], if any, no later than September 30, 1996, into an escrow account to be in Richmond, Virginia opened by and pursuant to this Court's Order on appropriate terms and conditions, which counsel for the parties shall memorialize in an Order and present for entry not later than August 30, 1996.

(5) Lloyd's shall inform all American Names who have made such escrow payments, plaintiffs' counsel and the Court when the disclosures required above have been completed. Within thirty (30) days thereafter, but not later than October 30, 1996, absent further order of this Court, all such Names must notify Lloyd's in the manner and in the terms prescribed by the Settlement Offer and the Reconstruction & Renewal plan whether they accept or reject that offer. If they accept the offer, their funds shall be released from the escrow account to Lloyd's. If they reject the Offer, their fund shall remain on deposit in escrow subject to the completion of this action and any further Order on the subject.

(6) Because the purpose of this Order is to protect American Names, the Lloyd's settlement offer and the August 28, 1996 deadline is hereby extended relative to all American Names.

(7) With respect to all American Names who elect to participate in this disclosure and review process, Lloyd's shall not, pending completion of the disclosure and review process, take any action to collect from such Names any amounts,

whether on deposit at Lloyd's or otherwise, for the purpose of Equitas funding.

(8) The terms of this order shall not affect in an way the acceptances of the Settlement Offer given previously by any American Name to Lloyd's. Counsel for the parties shall consult forthwith and advise the Court of their positions respecting the determination of any future claim by any American Name hereafter informing Lloyd's of an intention to rescind any such previous acceptance.

(10) The trial of this action on its merits is set for 9:00 a.m. November 4, 1996.

(11) At 9:00 a.m. on August 30, 1996, there will be a pretrial conference for consideration of a discovery plan and pretrial schedule about which counsel shall confer forthwith and which they shall present at the pretrial conference in the form of a draft Order.

(12) Pursuant to Fed. R. Civ. P. 65(c), and having considered the written submissions of the parties on the subject, the plaintiffs shall post bond, with surety, in the amount of One Hundred Thousand Dollars ($100,000.00), said amount being in the discretion of the Court, sufficient. The bond shall be posted not later than 2:00 p.m. August 26, 1996.

The Clerk is directed to send a copy of this Order to all counsel of record and to counsel for all amicus curiae.

It is so ORDERED.

/s/ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: August 23, 1996

APPENDIX D

Filed Aug 23 1996
Clerk, U.S. District Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:96cv522

LOUIS F. ALLEN, *et al.*,

Plaintiffs,

v.

LLOYD'S OF LONDON, *et al.*,

Defendants.

MEMORANDUM OPINION

INTRODUCTION

Ninety-three citizens of the United States instituted this action seeking disclosures guaranteed by the federal securities laws as to the plaintiffs' investments in Lloyd's. Because the plaintiffs are being forced by Lloyd's to an irrevocable election respecting their investment on August 28, 1996 which presents actual, imminent and irreparable injury, the plaintiffs have sought a preliminary injunction. Having satisfied the requirements of *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir.1992), the plaintiffs are entitled to a preliminary injunction upon satisfaction of bond and certain other conditions.

PROCEDURAL HISTORY

The plaintiffs (who, for reasons explained below, will be hereafter referred to as "Names") instituted this action under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78(j) and

78(n) (the "1934 Act") against Lloyd's of London, an unincorporated association; the Corporation of Lloyd's, a/k/a the Society of Lloyd's; and the Council of Lloyd's (hereinafter referred to collectively as "Lloyd's"). The original Complaint designated other defendants: Equitas Holdings Limited; Equitas Reinsurance Limited; and Equitas Limited, a/k/a Equitas or Equitas Group (hereafter referred to collectively as "Equitas"). The Names voluntarily dismissed Equitas without prejudice.

The operative pleading around which the briefs have been filed is the First Amended Complaint which added several new plaintiffs. In Count One, the Names allege that Lloyd's has violated, and is violating, § 14(a) of the 1934 Act, by soliciting proxies or consents or authorizations respecting equity securities that are subject to the registration requirements of the 1934 Act. That count also alleges a violation of SEC Rule 14a-3 which prohibits the solicitation of any proxy or consent or authorization subject to SEC regulation without currently furnishing, or previously having furnished, a publicly filed written proxy statement containing information required by the Securities and Exchange Commission ("SEC"). Count One also charges that information which is being distributed with the solicitation of a proxy, consent or authorization contains material misrepresentations or omissions in violation of SEC Rule 14a-9. In Count Two, the Names allege that Lloyd's has violated, and is violating, § 10 of the 1934 Act and SEC Rule 10b. In Count Three, the Names seek a declaratory judgment under 28 U.S.C. § 2201 that Lloyd's is offering to sell to the Names securities within the meaning of § 2b(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (the "1933 Act"), and that Lloyd's is violating the 1933 Act.

Lloyd's has moved to dismiss the action for lack of proper venue and on the ground of *forum non conveniens*. The Names have moved for a preliminary injunction. The Names have filed

a motion for leave to file a Second Amended Complaint which adds factual allegations and seeks additional relief based upon transactions, occurrences or events which have taken place since the First Amended Complaint was filed. The Second Amended Complaint adds two new substantive counts for relief, Counts Four and Five. In Count Four, the Names allege that Lloyd's has commenced an issue tender offer pursuant to which Lloyd's is offering to exchange new securities in Equitas for the Names' existing securities in Lloyd's without having complied with § 13(e) of the 1933 Act and the applicable SEC rules. In Count Five the Names allege that Lloyd's is offering to sell, and is selling, an investment contract in Equitas that is a security without having registered the interest therein in violation of §§ 5 and 12(1) of the 1933 Act and that Lloyd's has committed misrepresentations and omissions in connection with that offer and sale, thereby violating § 12(2) of the 1933 Act. Lloyd's has opposed the filing of the Second Amended Complaint.

Having reviewed the motion for leave to file the Second Amended Complaint and the opposition thereto, it appears that the plaintiffs are entitled to file the amendment and that Lloyd's will not be prejudiced thereby. Hence, the Second Amended Complaint may be filed. The Second Amended Complaint adds nothing which affects consideration of Lloyd's motion to dismiss under Fed.R.Civ.P. 12(b)(3) for improper venue or, alternatively, under the doctrine of *forum non conveniens*. Whereas Counts Four and Five takes affect the analysis of the Names' motion for preliminary injunction, they will not be considered because the briefing of the preliminary injunction issues has been conducted without reference to the Second Amended Complaint.

STATEMENT OF FACTS

The action and the motions currently before the court for resolution present complex and serious issues respecting somewhat unique transactions involving a rather unusual arrangement between the Names and Lloyd's. It is therefore necessary to provide more than a brief explanation of the factual setting and circumstances at issue.

The General Background Of Lloyd's Of London

What is now commonly known as the venerable institution of Lloyd's of London began in the late 17th century in a coffee house which was a gathering place for marine underwriters and shipowners. Because it was necessary for the individual underwriters to share risks insuring seagoing vessels and their cargoes, there arose a group of underwriters which subsequently became known as the Society of Lloyd's. Lloyd's was granted a semi-exclusive right to underwrite marine risks in the United Kingdom, and by the mid-1800's, Lloyd's began to insure risks other than marine. By the late 1800's, Lloyd's had begun to underwrite risks, marine and otherwise, in the United States. Lloyd's today, however, is a substantially different entity than it was in its early years.

The parties agree that, notwithstanding the popular conception to the contrary, Lloyd's is not an insurance company. *Roby v. Corporation of Lloyd's*, 796 F.Supp. 103, 104 (S.D.N.Y. 1992), aff'd 996 F.2d 1353 (2nd Cir. 1993), *cert. denied* 510 U.S. 945 (1993); Second Affidavit of Stephen E. Hudson ("Hudson Aff. II"), Exh. C, Report of Robert L. Westin ¶ 33 ("Westin Report, ¶ ____"). Lloyd's is a self-regulating entity which controls an insurance market. This marker is sustained by the called and uncalled capital of individuals who are admitted to membership in Lloyd's, and who pledge their personal assets to Lloyd's, to support the underwriting of insur-

ance and the market which Lloyd's maintains and regulates. Westin Report, ¶ 33. The organization and operation of Lloyd's and the Lloyd's insurance market is based upon six "private" Acts of Parliament (the Lloyd's Acts of 1871, 1888, 1911, 1925, 1951 and 1982).

The Corporation of Lloyd's was created by the Lloyd's Act of 1871 and it is charged with conducting administrative functions, advancing and protecting the interests of the members of Lloyd's (the Names) and the collecting, publishing and disbursing of information about Lloyd's.

The Lloyd's Act of 1871 also established the Committee of Lloyd's, comprised of members of the Society of Lloyd's, whose purpose it is to manage the affairs of the Society and to exercise the Society's powers. The Lloyd's Act of 1982 created the Council of Lloyd's to take over the functions of the Committee of Lloyd's. The Council of Lloyd's thus acts much like the board of directors and officers of a corporation in the United States. It also acts much like a regulatory agency with control over the insurance market that today functions within Lloyd's present day configuration.

Those who carry on the insurance business at Lloyd's are the insurance brokers, the active underwriters, the Members Agents, the Managing Agents, and the Names. As explained in an annual report recently issued by Lloyd's, the Names are the individual investors in Lloyd's. (Hudson Aff. II, Exh. E). The Names select a Members' Agent from among several candidates designated by Lloyd's and the Members' Agent places the Names in syndicates which are run by Managing Agents approved and regulated by Lloyd's. *Roby*, 796 F.Supp. at 104.

Although the Names are the ultimate underwriters of the insurance, in that they are responsible to pay the losses covered by the policy issued to an insured, the Names are

prohibited by Lloyd's rules from participating in the underwriting process or in the recruiting of other Names into the syndicates to which they are assigned. The Names have no management responsibility and they cannot bind their fellow Names or any syndicate of which they become members. Each Name's membership in a Lloyd's syndicate is a personal one and is not assignable. *Id.*

Before 1969, memberships in Lloyd's were limited to citizens of the United Kingdom. Thereafter, membership was available to citizens of the United States and, until 1994, only individuals could become members. Beginning in 1994, Lloyd's permitted corporations, foreign and domestic, to become Names. Since 1995, individual citizens of the United States no longer can be Names; however, any citizen of the United States who was a Name before 1995 retains that status until all insurance obligations are satisfied.

The Operation of Lloyd's

The operation at Lloyd's has been described as follows:

> Members' agents recruit new Names and handle the admission of Names to Lloyd's membership. Member's agents are ordinarily also chosen to act as Names' underwriting agents and, in that role, are responsible for placing Names in syndicates. In connection with the latter the member's agent contracts with the "Managing Agent" to place the member in a group comprised of two to several hundred other Names. These groups constitute the syndicates. Managing agents run the syndicates. They hire the syndicate's active underwriter and maintain the syndicates' accounts and other records, among other things.

> An employee of the managing agent, known as the "active underwriter," acts on behalf of the Names in the syndicate in the "buying" and "selling" of insurance risks. Active underwriters are seated on the underwriting floor at Lloyd's in London. Brokers approach the active underwriter at his desk — in Lloyd's parlance "the box" — to solicit the underwriter's agreement to accept a risk. The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will assume.

Roby, 796 F.Supp. at 104-105 (internal footnote omitted).

There are two classes of Names: working members, who are occupied principally in the business of insurance in the Lloyd's market, and external members, who are not thusly occupied and who are expressly forbidden from participating in the business of insurance at Lloyd's. Westin Report, ¶ 34. As put by Ian Hay Davison, former chief executive officer of Lloyd's: "[o]riginally Names at Lloyd's were all workers in the market themselves, but since 1945, with the rapid growth of the membership of Lloyd's, an increasing proportion are outsiders. At the latest count, 82% of the Names were external members *who were in fact nothing other than passive investors in the syndicates in which they participated*." Second Hudson Affidavit, Exh. F, A VIEW OF THE ROOM LLOYD'S CHANGE IN DISCLOSURE, p. 28.

The Names subscribe to a certain percentage of the risks on policies written through the syndicates to which they subscribe and, in return, they are entitled to a certain percentage of the premium paid to the syndicate by the insured, after the satisfaction of any insured losses and the deduction of fees and charges. *Roby*, 796 F.Supp. at 105. The undisputed record

is that the liability of each Name in a syndicate for the satisfaction of the coverage written by the syndicate is several, not joint.

A review of the record establishes that the Council of Lloyd's determines who may serve as Managing Agents. Lloyd's also appoints and approves the "Members' Agents" who are supposed to represent the Names. It appears that the Managing and Members' Agents are largely controlled, however, by Lloyd's. Thus, for example, it is Lloyd's which develops, prepares and dictates the use of the forms and contracts which control the relationship between the Names and the Members' Agents, between the Members' Agents and the Managing Agents and between the Managing Agents and Lloyd's.

The insurance products which emanate from the Lloyd's market are promoted under the trade name "Lloyd's" or "Lloyd's of London." The Names are not listed as underwriters or insureds in any report filed by Lloyd's with any insurance regulatory body in the United States, except in Illinois and Kentucky where the Names are so listed because in those states the syndicates in which they participate may issue direct insurance.

To become members of Lloyd's, Names must apply to Lloyd's and must be approved by Lloyd's. They are subjected to a personal interview in London by the so-called ROTA Committee of Lloyd's to assure that they understand the nature of the risks they are running. The Names also are subjected to a "means test" to assure that they deliver upon the obligations to which they subscribe upon becoming Names. The Names pay an entrance fee to Lloyd's; they also deposit a letter of credit with Lloyd's. They agree that the premium revenue generated in the syndicates to which they subscribe is to be held into a premium trust fund; and that no profit therefrom can be paid to them except pursuant to the rules

by which claims are adjusted and paid by others. Meanwhile, the premium trust funds are invested. The Names also agree to pay an annual subscription fee and they contribute to the Lloyd's Central Fund, through levies on the premium trust accounts. Additionally, the Names promise to meet cash calls in the event that the premium trust funds and the revenues therefrom are inadequate to pay any incurred loss. Finally, the Names agree to accept unlimited liability, to which they pledge their entire net worth (the proverbial "last cuff-link"), up to the percentage of risk they agreed to accept when they form a particular syndicate.

Once a Name has paid the fees, made his deposit into the Lloyd's deposit, and selected a Members' Agent from those recommended by Lloyd's, the Name may join syndicates which, as explained above, are controlled by the Managing Agent. Syndicates are formed annually. In the fall of each year, Managing Agents underwrite particular risks. Membership in a syndicate is opened to the Names when they receive a list of possible syndicates from their Members' Agents. Syndicates are comprised of as few as two, and as many as several hundred Names. Usually, Names join several syndicates. To do so, they select from a list of syndicates recommended by their Members' Agents. As to each syndicate joined, the Name specifies the quantity of risk to be assumed by designating the amount of pounds sterling for which subscription is made.

The insurance policies are put together by the underwriters employed by the Managing Agents. The policy language usually contains standardized language, clauses and forms prepared by Lloyd's, but the underwriter is free, within limits, to select or create non-standard insuring clauses, exceptions and other non-standard policy language. The underwriter issues a policy to the insured. The underwriter assigns to each Name the fractional share of the risk designated in the form submitted

by the Name to the Members' Agent. The underwriter collects the premium and puts it in the syndicate's premium trust fund where it remains (and is invested) until the syndicate is closed. Claims presented under the policy are adjusted, not by the Name, but by the Managing Agent and losses are paid.

The Lloyd's market operates pursuant to a three year accounting cycle. Thus, although syndicates are formed annually for a single year of account, underwriting profits and losses for each syndicate year of account are not determined until the end of the second calendar year after the syndicate year of account has ended. As a result, the syndicate year of account remains open for completing the business that was underwritten for the year of account but there is no new insurance written for that year of account. Affidavit of Andrew A. Duguid, Secretary to the Council of Lloyd's, July 26, 1996, ¶ 23 (hereafter "Duguid Aff. 1, ____"). To close the syndicate's year of account, its Managing Agent estimates liabilities on reported claims and on claims incurred, but not reported (contingent liabilities). The estimated liabilities are then re-insured by another syndicate which underwrites in a subsequent year of account. This process usually occurs at the end of the third year and it is called "reinsurance to close (RITC)." The Names delegate to the Managing Agent, pursuant to the Managing Agent's Agreement, the authority to close a syndicate year of account by obtaining reinsurance to close. (Duguid Aff. 1, ¶ 24). Ordinarily, the Name is not involved in that process.

RITC does not change the several nature of a Name's liability. Rather, RITC is a form of reinsurance in which one set of Names agrees to reinsure the risks undertaken by another set of Names in exchange for reinsurance premiums. (Duguid Aff. 1, ¶ 25).

When it is not possible to estimate, with a reasonable degree

of certainty, the magnitude of potential liabilities for a syndicate, or, when for some other reason, it is not possible to obtain RITC, the syndicate is then said to be in "run-off." Names who are in a syndicate which is in run-off remain subject to further losses as claims are incurred, must maintain their Lloyd's Deposit, and cannot resign from Lloyd's, even they cease engaging in active underwriting, until all claims underwritten in that syndicate's year of account are settled. (Duguid Aff. 1, ¶ 26).

Relationship Between Lloyd's and Names

As explained previously, to become a Name a person must become a member of the Society of Lloyd's. Under the rules of Lloyd's, the prospective Name must be sponsored by a Name. Lloyd's sets the criteria to be met by Names and, as a condition to membership, the Name is required to execute a contract with Lloyd's entitled the General Undertaking bv which the Name agrees to comply with the six controlling Lloyd's Acts, any subordinate legislation adopted thereunder, and the rules and bylaws of Lloyd's. Two parts of the General Undertaking operate together to define the controlling law and the appropriate forum. Under § 2.1 of the General Undertaking.

> The rights and obligations of the parties arising out of or relating to the Members' membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Under § 2.2 of the General Undertaking:

> Each party hereto irrevocable agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature

> arising out of or relating to the Members membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause Two referred to as 'Proceedings') arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause Two and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and shall be enforced in the courts of any other jurisdiction.

Def.'s Ex. 35.

Lloyd's also requires that a Name agree, as required by the Lloyd's Act of 1982, to place in trust, for the benefit of policyholders, all premiums paid by insureds in connection with any insurance business underwritten by a syndicate of which a Name is a member. Those premiums in trust, therefore, are the first source of payment of any valid claims underwritten by the syndicate. Of course, the premiums are not available to the Name or to a creditor of the Name. (Duguid Aff. 1, ¶9).

Furthermore, the Names are obligated to provide collateral as security for future underwriting obligations in the form of the "Lloyd's Deposit." The collateral can be in the form of cash, securities or a letter of credit. Lloyd's may draw down on the credit, or otherwise resort to the security, when the funds in the syndicate's premium trust fund are insufficient to satisfy the underwriting obligations and if the member does

not respond to the cash calls which the Name agrees to make at the request of a member's agent. Funds drawn from the Lloyd's Deposit are then placed in the premium trust funds and used to satisfy the Names' obligations to policyholders. (Duguid Aff. 1, ¶ 11).

It is also important to remember that each year the Names are required to pay a nonrefundable assessment to the Lloyd's Central Fund, which was established in 1927 to protect policyholders by affording a means of advancing payment to them where an individual Name defaulted in the obligation because of an inability to or refusal to pay. The assessment for the Central Fund is made by Lloyd's in the form of a levy against the premium trust funds of the syndicate. Neither the defaulting Name nor the policyholder has a legal right to demand payment by the Central Fund. The power to disburse from the Central Fund rests solely in the discretion of the Council of Lloyd's. Disbursement occurs only when, in the opinion of the Council, "it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members." (Duguid Aff. 1, ¶ 13.)

If the Council makes a payment to an insured from the Central Fund in respect of a Name's obligation, the Central Fund is entitled to reimbursement from the Name. If reimbursement is not forthcoming on a voluntary basis, the Name is subject to suit in the courts of England. The Central Fund is made up by pooling contributions of all Names. (Duguid Aff. 1, ¶¶ 12-14).

Consequences Of The Litigation Against And Involving The Names And Other Participants In The Lloyd's Market

The Complaint alleges that, in the late 1980's and early 1990's, many Lloyd's syndicates began to incur heavy losses

as the consequence of so-called "long-tail" asbestos, pollution, and health hazard claims, as well as natural and man-made disasters such as Hurricane Hugo, Pan Am Flight 103 and the Exxon Valdez. It is further alleged that, beginning in 1986, the liability for claims of this sort generally was passed along to new Names during the RITC process so that risks which were underwritten by earlier policies were knowingly and fraudulently shifted to the new Names by Managing Agents with the knowledge or assistance of some Members' Agents, accountants, Lloyd's and others. It is also alleged that those persons knew these risks to be extraordinary and inevitable. According to the plaintiffs' theory, the insiders of Lloyd's thus passed virtually certain liability on their part along to the new Names, many of whom were American Names. (First Amended Complaint, ¶¶ 26-30). The Complaint further alleges, that for several years and continuing until this date, the Names in these victimized syndicates have been called upon by Lloyd's to pay substantial losses, driving many Names into financial ruin.

The record confirms that fraud of this sort did occur in the Lloyd's market before 1993. Indeed, the Chief Executive Officer of Lloyd's has admitted that Lloyd's investors have been victims of fraud. (Hudson Aff. 1, Exh. B). A report of the British government confirms the past presence of widespread fraud in the Lloyd's market in some of the ways alleged in the Complaint. (Hudson Aff. 1, Exh. C). State regulators in the United States also have found that American investors were defrauded in connection with soliciting the investment that is represented by the Names' membership in Lloyd's. (Hudson Aff. 1, Exh. A, pp. 92-93; Hudson Aff. 1, Exhs. F and G). The magnitude of the fraud and its impact is evidenced in part by the fact that various Names and groups of Names have secured judgments or arbitration awards against various members of the Lloyd's enterprise which in sum exceed £1 billion. (Westin Report, ¶ 12).

It is also undisputed that the extensive litigation by Names against various members of the Lloyd's market and persons or professionals employed by them have created a serious threat to the continued existence of Lloyd's and to the insurance market it comprises. Additionally, a number of Names have refused to pay any funds to their Members' Agents for application to the satisfaction of claims by policyholders, either because: (i) they are unable to do so; (ii) they are unwilling to do so until they realize on the awards or judgments to secure recompense for the frauds against them; or (iii) they believe that the frauds of which they are victims constitute defenses to any obligation to pay. Thus, there have been defaults on cash calls and there have been substantial drawn-downs from the Lloyd's Central Fund. (Duguid Aff. 1, ¶¶ 33-34).

The losses at issue occurred in syndicates formed in 1992 and before. The three most recent years of account (1993, 1994 and 1995), are expected to be profitable for most Names whose syndicates underwrote in those years. (Duguid Aff. 1, ¶ 33). As explained by Lloyd's Chief Executive Officer, Ronald Sandler, in Lloyd's July 1996 Reconstruction & Renewal Proposal (the settlement offer portion):

> The Lloyd's market has returned to profitability. As announced on 12 July, 1996, the 1993 pure year of account reported profits of £1,084 million after personal expenses, including the members' special Central Fund contribution. The 1994 and 1995 years of account have not yet been closed but it is already apparent that both will prove to have been very profitable trading periods. At this stage, managing agents' projections show profits to members after personal expenses, including the members' special Central Fund contributions, of approximately £1 billion for 1994 and nearly £900 million for 1995.

Id. p. ii. Notwithstanding this recent return to profitability, the effect of the losses from the earlier years is still being felt; syndicates from 1992 and before have not been able to secure RITC, or otherwise satisfy their liabilities, and hence remain open. One result is that the Names who underwrote through those syndicates continue to be subject to continuing liability on policies underwritten in those years. Many of those Names are either unable to pay those losses or are unwilling to do so because they believe that they were caused by the fraud of members of the Lloyd's enterprise. (Duguid Aff. 1, ¶ 35).

Equitas And Reconstruction & Renewal

The losses sustained by the Names for 1988 to 1992 were approximately £8 billion. By early 1995, Lloyd's determined that by the end of 1996 the Central Fund could be exhausted unless somehow replenished. This conclusion was based on the results of a reserving project which had been under way at Lloyd's since 1993 in an effort to assess the nature of the liabilities presented in the syndicates which had been tainted by the previously described fraud.

Lloyd's also concluded that the insurance market could not continue into the future unless the "1992 and prior" liabilities were reinsured in some fashion. However, Lloyd's was unable to identify commercial reinsurers anywhere to take on these vast potential liabilities. Without reinsurance to close, the 1992 and prior syndicates could not close and would go into "run-off": a liquidation of sorts.

To solve this problem, and to revitalize the Lloyd's insurance market by creating a "firebreak" between the 1992 and prior liabilities and the future Lloyd's market, Lloyd's has proposed a "reconstruction and renewal" ("R&R").

R&R is the product of an impressive and extensive effort by many people. It has involved a reserving profit which

consumed approximately 18 months and cost approximately £150 (which Lloyd's paid for subject to reimbursement out of the funding for the R&R to be paid by the Names). It involved settlements with several groups of defendants (e.g. Managing Agents, Members' Agents, accountants, errors and omissions insurers for Lloyd's offices and directors) in suits brought by some Names. There has been extensive communications with some 50 Names Action Groups respecting the R&R. The resulting proposal is to be taken as the product of serious, substantial efforts to resolve an insurance scandal of great proportions and to create a new insurance market that has been separated from the effects of its predecessor.

The goals of R&R are to:

(a) Enhance the security of policyholders for pre-1993 policies by strengthening available reserves and creating a means to achieve "economies of scale and returns on invested reserves not available under the traditional syndicate structure;"

(b) Give Names "a final reckoning of their pre-1993 underwriting liabilities which, if satisfied, would allow Names to resign from Lloyd's;"

(c) Settle "all disputes and litigation arising out of pre-1993 years of account between Names, their underwriting agent, Lloyd's and other participants in the Lloyd's market;"

(d) Provide substantial financial assistance to Names with substantial losses; and

(e) Enhance the stability of the market for the benefit of those who continue to underwrite in the future.

Duguid Aff. 1, ¶ 36. According to documents published in connection with the R&R, the Society of Lloyd's to date "has been able to deal with the non-payment of members' obligations by resort to the Central Fund," the net assets of which as of June 30, 1996 stood at approximately £505 million. R&R Proposal at ii. However, in the absence of a successful implementation of R&R, the Society believes that the Central Fund would not be able to meet the anticipated cash requirements caused by members' shortfall. In that event, the Society would be unlikely to meet the British government's test for the solvency of the members of Lloyd. It also likely would not meet the solvency tests of state insurance regulators in the United States. According to the R&R, "if the reconstruction plan were to fail, the Council would be required to reconsider whether the Society were still a going concern." R&R Settlement Offer, July 1996, p. ii. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off with consequent damage to members. *Id.*

The R&R plan has two principal components: (1) a settlement offer which is intended to achieve a global settlement of all litigation, and (2) the formation of Equitas which is intended to provide RITC for 1992 and prior syndicates. R&R, Settlement Offer, July 1996, p. 1.

The settlement fund is made up of (1) combined litigation settlement funds of approximately £1.1 billion contributed by Lloyd's, Managing Agents, Members' Agents, Errors and Omissions insurers of Managing and Members' Agents, auditors, Lloyd's brokers, the past and present directors, officers, partners and employees of Lloyd's, and various other professionals who have been asserted to have liability to the Names; and (2) £2.1 billion of debt credits. *Id.* at p. 2. The settlement fund and Equitas are umbilically connected because

the Settlement Fund will not go to the Names but will instead become part of the capital of Equitas. Thus, as part of the R&R each Name will be assessed a "premium share" of the reinsurance to be provided by Equitas. A Name's share of the Settlement Fund must go to satisfy his Equitas premium. To benefit from any allocations from the settlement fund, the Names must accept the settlement offer, must enter into the settlement agreement, and must pay their so-called "finality bills."[1] The average Finality Bill is about $57,000. Westin Report at 3. (Hudson Aff., Exh. C). However, "[a]ccepting Names must agree to waive existing and future claims in respect of their 1992 and prior business (including rights against Managing and Members' Agents, E & O insurers, brokers, auditors, Lloyd's, Equitas, advisers and others." R&R, Settlement Offer, July 1996, p. 2.

The second component of the R&R plan, indeed, its key element "is the creation of a company called Equitas which will (i) provide reinsurance to close to those Names who have liabilities on policies allocated to years of account prior to 1993 (including Names on syndicates in later years who have reinsured liability from 1992 or prior); and (ii) run-off management services in respect of these reinsured liabilities. In effect, Equitas will supply the reinsurance cover which Names who underwrote through run-off syndicates have been unable to procure through traditional means. Reinsurance to close will be provided to the Names pursuant to a reinsurance contract from Equitas Reinsurance Ltd." (Duguid Aff. 1, ¶ 37).

Since 1993, independent professionals have conducted a reserve analysis of all liabilities in the Lloyd's market for the 1992 and prior underwriting years of account. That analysis

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[1]The Finality Bill is a reconciliation of a Name's insurance liabilities, the credits to which he is entitled and his bill for the Equitas premium.

shows that Equitas must "receive sufficient reinsurance premiums to obtain DTI (the British Department of Trade Industry) authorization" to proceed, *i.e.*, to assure solvency. That amount, as of December 31, 1995, was estimated to be £14.7 billion but is subject to change. (Duguid Aff. 1, ¶ 38). Each Name will have to pay a part of that reinsurance premium which, (Duguid Aff. 1, ¶¶ 38-39), in essence will be the capital for the formation of Equitas. The premium is said to represent the cost to the Name of reinsuring all underwriting obligations from pre-1993 syndicate years of account. The Equitas premium will be funded from: (i) the Names' interest in the premium trust funds; (ii) financing made pursuant to the £2.1 billion debt credit package; and (iii) writing off by Lloyd's of £700 million of Central Fund debt owed by the Names to the Society of Lloyd's (which in turn will result in the transfer of the Central Fund to Equitas).

According to the R&R plan, the debt credit and the combined litigation settlement allocation for a Name is set out in the Name's Finality Statement. According to the R&R, once the Name validly accepts the settlement offer, but not until, "Lloyd's will apply any debt credit and combined litigation settlement funds allocations to meet that Name's obligations as reflected in his finality statement." R&R, Settlement Offer, July 1996, p. 21. This is subject to the critical proviso that the Name first must have paid his finality bill by September 30 (and that is so even if the conditions to finality of settlement have not been achieved by then). The Name also, by accepting the Settlement Offer, will acknowledge his obligation to pay his share of the Equitas premium which also is reflected on the Finality Statement.

It is important to note that even acceptance of the Settlement Offer and implementation of the R&R plan will not assure that the Names are free of the obligations assumed by virtue of their membership in Lloyd's and their participation in the

1992 and prior syndicates. The R&R plan frankly confesses that the "finality" offered in it is not absolute and that "finality" will only be "absolute" if Equitas meets the 1992 and prior liabilities in full as they fall due. (R&R, Settlement Offer, July 1996, p. 142). That, of course, will not be known for many years to come. The R&R plan also candidly confesses that there are a number of factors which could in fact make it impossible for Equitas to meet the 1992 and prior liabilities in full as they come due. In that event, the Names would be required to continue to pay any losses.

The R&R plan, therefore, offers the Names the prospect of some hope for finality, but no guaranty thereof. In addition, it provides accepting Names the benefit of:

- Allocations from the combined litigation settlement funds
- Allocations of debt credit
- Expense refunds
- Any refund of the members special Central Fund contribution

Id. at 145. In order to secure these benefits, each Name will have to: *(1) pay a finality bill by September 30, 1996, and (2) execute a complete waiver and release of all claims by accepting the offer presented in the R&R and agreeing to the plan, including the funding of Equitas, by August 28, 1996. Id.* If there is no acceptance rejection will be deemed to have occurred.

The R&R forcefully describes the consequences to Names who do not accept the settlement offer. As to Names who are litigating with Lloyd's, the following consequences are identified:

- Loss of benefits of the settlement offer

- Uncertainty of litigation recoveries (against Lloyd's and others)
- Increased litigation costs for removing litigants (non-settling litigating Names will have to pay more pro rata to maintain litigation)
- Names will face continued uncertainties in securing litigation proceeds (notwithstanding that it has lost at the trial court on the issue of whether litigation recoveries have to be applied to a Name's trust fund, Lloyd's will continue its litigation on that issue through appeal)
- Continuing liability to pay full amount of their underwriting liabilities (Lloyd's threatens vigorous litigation to extract the full measure from non-settling Names)
- "Pay now, sue later" (Names will be immediately liable for their liabilities and may have to wait months or years to recover from Lloyd's or any third party)
- Claims against parties other than agents (including auditors and brokers) will be complex and lengthy

Id. at 146-47.

The R&R also summarizes consequences for non-litigating Names who do not accept the settlement offer:

- Loss of the refund of the members special Central Fund contribution on the 1993, 1994 and 1995 years of account
- Loss of any debt credits
- Continuing liability to pay the full amount of their

liabilities, which will be vigorously pursued by Lloyd's as described above

The Lloyd's entities, the Department of Trade and Industry ("DTI") of the British government, insurance commissioners in the United States, various state agencies and others have concluded that the R&R represents the best, realistic proposal to restore the Lloyd's market and to relieve the enormous financial burden currently confronting the Names. Lloyd's contends that any delay in the approval of the R&R will disable it from writing new insurance because the ensuing three or four months are the "renewal season" in the insurance industry. This, says Lloyd's, will put it at a competitive disadvantage in the market and further deprive it of funds with which to operate. Further delay in the approval of the R&R will impair the ability of Lloyd's to meet solvency tests in the United States and England, which they say must be met by the end of August, thereby compromising, or eliminating, its ability to underwrite insurance directly or through reinsurance in many markets.

The structure of Equitas is significant to the issues presented by the preliminary injunction motion. The R&R proposal has been set forth in various documents beginning in May of 1985 and the proposed structure of Equitas has been changed on several occasions, in no small part as the result of Lloyd's efforts to avoid the need for compliance with the United States securities laws.

Moreover, it is worth noting that, while the current settlement offer purports to be in its final form there are a number of statements in it which acknowledge that it is far from final and that many of its terms remain to be negotiated. For example, the settlement offer is being made to the Names "on the basis of funding commitments which have been received by the Council from the various contributing parties." R&R,

Settlement Offer, July 1996, p. iii. The next sentence provides: "[A] number of these commitments are conditional or remain subject to the receipt of final documentation ... The risk remains, however, that some of these commitments may not become legally binding and that the reconstruction plan will fail." *Id.*

Also, in a rather remarkable aspect, the R&R plan is being put forth with very broad disclaimers. As explained, the settlement offer is made in full and final settlement of any and all claims that in any way involves the Names' 1992 and prior business. And, there is a forward component to that waiver by virtue of Clause 12.2 of the Settlement Agreement which requires the Accepting Name to acknowledge that, in relation to the Settlement Agreement and the making of the settlement offer:

- No party to the Settlement Agreement owes any duty to disclose any matter;
- No party owes any duty of care in respect of any statements or representations which are made;
- No party will be entitled to rescind, avoid, terminate or cancel the Settlement Agreement on the grounds of any misrepresentation, misstatement, mistake or nondisclosure;
- No party shall have any liability to any Name for any misrepresentation, misstatement, mistake or nondisclosure; and
- Any claim a Name may have in respect to any of the above is waived and released.

R&R, Settlement Offer, July 1996, p. 29 and Settlement Agreement, Clause 12.2, p. 19. Furthermore, the R&R documents contain much language which, at least arguably,

would make reliance on any statement unreasonable within the jurisprudence controlling recovery for fraud.

Finally, it seems to be beyond serious question that the courts of England, applying English law, will enforce these agreements and therefore nullify any obligation of disclosure or any recourse for a misrepresentation in connection with disclosure. In sum, the Names are being asked to agree to enormous liabilities and to forego claims which, based on previous judgments and arbitration awards, have been proven to be of substantial value on the basis of limited information and with the knowledge that they will have no recourse if whatever information has been provided is erroneous, intentionally or otherwise.

Against this background, we consider the motion to dismiss and then the motion for preliminary injunction.

LLOYD'S MOTION TO DISMISS THE ACTION

I. VENUE

Lloyd's has moved for dismissal of this action pursuant to Fed.R.Civ.P. 12(b)(3), claiming that the choice of law and choice of forum provisions in the General Undertaking operate to make any court in the United States, and specifically the Eastern District of Virginia, an improper venue for litigation over the issues presented in this action.[2]

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[2]The General Undertaking, which all Names are required to enter into in order to become a Name, contains both a choice of law and choice of forum provision. Paragraphs 2.1 and 2.2 of the General Undertaking state respectively:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be *governed by and construed in accordance with the law of England.*

(footnote continued)

A. The Applicability of the Choice Clauses

Because the choice of forum clause is a matter of contract, the threshold issue is whether the clause applies to the claims presented by the pleadings. Hence, it is necessary first to determine whether the disputes presented respecting both the Names' investment in Lloyd's and the R&R plan "aris[e] out of or relat[e] to [Plaintiff's] membership of, and/or [their] underwriting of insurance business at, Lloyd's."

Notwithstanding that the formation of, and the reinsurance into, Equitas and the R&R plan were conceived long after the execution of the General Undertaking, it cannot be said that the controversies and disputes about them as presented in this action do not "aris[e] out of" or "relat[e] to" Names' relationship and underwriting activities at Lloyd's. Within the Lloyd's insurance market, reinsurance is an integral part of underwriting. A principal purpose of the formation and capitalization of Equitas is to provide reinsurance coverage in an effort to relieve the Names of their 1992 and prior liabilities which arose out of their memberships of Lloyd's and which relate to the insurance underwritten by the syndicate of which they are members. Likewise, the individual settlement offers being made to Names pursuant to the R&R plan arise out of and relate to Names' underwriting activities. The settlement offers, which, if accepted, provide substantial financial assist-

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(footnote continued)

> Each party hereto irrevocably agrees that the *courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature* arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding ... arising out of or relating to such matters shall be brought in such courts and, to this end, *each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England* and irrevocably waives any objection which it may have now or hereafter ...

(emphasis added).

ance in paying the Equitas premium, are being made in settlement of all claims arising out of the Names' prior underwriting activities.

The Names' argument that the language in the choice clauses, (if they are enforceable) does not control is based on the theory that neither Equitas nor the related R&R plan were contemplated or understood by the parties at the time of the signing of the General Undertaking. The Names have cited no authority for the proposition that the relevant inquiry in determining what "aris[es] under" or "relat[es] to" their activities is the contemplation of the parties at the time of signing. More importantly, under the express terms of the General Undertaking itself, the entire agreement applies in a variety of circumstances not explicitly or impliedly envisioned at the time of signing. Section 1 of the General Undertaking reads:

> Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as *may be prescribed* and notified to the Member or his underwriting agent by or under the authority of the Council.

(emphasis added). That language plainly provides that the agreement brings within its reach future action by the Council of Lloyd's and other Lloyd's entities such as the bylaws which were passed in conjunction with the formation of Equitas and the formulation of the R&R plan.

Moreover, as the Names argue on the merits of their motion for injunctive relief and as the evidence established, Lloyd's is an integrated, interdependent enterprise. Therefore, the broad language of Clause 2.2 ("any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or of underwriting insurance business at, Lloyd's") encompasses every activity and every failure to act of which the Names complain.

B. The Enforceability Of The Choice Clauses

As Lloyd's counsel made clear in argument, and as the Names agree, Lloyd's request for dismissal is to be tested on the basis of the allegations of the complaint. Hence, unless the allegations as to the existence of a security are facially frivolous, (and they are not), resolution of the motion to dismiss does not necessitate a determination whether, as a matter of fact or law, there is a security. Rather, the existence of a security is to be presumed and the question becomes whether, in perspective of the securities laws of the United States, the choice clauses are enforceable. If they are, the inquiry is ended and the action must be dismissed.

Against that background, and assuming both that United States' securities laws apply and that the choice clauses would apply by their terms to the controversies and disputes raised in the Complaint, the next issue is whether the choice clauses are enforceable.

Four United States Courts of Appeals have addressed the enforceability of the choice clauses and each has held that the clauses are enforceable. *See Shell v. R.W.Sturge, LTD*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied* 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2nd Cir. 1993),

cert. denied 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.1992), *cert. denied*, 506 U.S. 1021 (1992); *See also Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir.1993) (enforcing the choice clauses against a Name who brought common law tort and contract claims). All of those appellate decisions are based, to varying degrees, upon interpretations of four decisions of the Supreme Court of the United States dealing with the enforceability of similar choice of law and choice forum clauses found in international contracts. *See Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972); *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974) reh'g denied 419 U.S. 885 (1974); *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Carnival Cruise Lines, Inc. V. Shute*, 499 U.S. 585 (1991).

This unbroken chain of intermediate appellate authority respecting the choice clauses in the General Undertaking has been the foundation for several district court decisions in other circuits. *See, e.g., Richards v. Lloyd's of London*, No. 94-1211, 1995 U.S.Dist. LEXIS 6888 (S.D.Cal. Apr. 28, 1995)[3]; *McDade v. NationsBank of Texas, N.A.*, Civ. No. H-94-3714 (S.D.Tex. June 28, 1995); *Haynsworth v. Lloyd's of London*, Civ. No. H-96- 210 (S.D.Tex. July 15, 1996). Only in *Leslie v. Lloyd's of London*, No. H- 90-1907, 1995 U.S.Dist. LEXIS 15380 (S.D.Tex. Aug. 20, 1995), has a federal court found that the choice clauses in Lloyd's General Undertaking were unenforceable.

Therefore, it is not lightly that, in this action, this court parts company with the previous decisions and agrees with the

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[3]*Richards* is currently on appeal in the United States Court of Appeals for the Ninth Circuit. Briefing has not yet been completed and oral argument has not yet been scheduled. Memorandum of Law in Support of Lloyd's Motion to Dismiss First Amended Complaint ("Lloyd's Memo.") at 17, n. 9.

Names that those clauses *cannot* be enforced here. Three considerations point rather clearly to that conclusion: (1) *The Bremen* line and its progeny are factually different from this action; (2) the Supreme Court recently has altered significantly the analysis under *The Bremen* line of cases in a manner that is controlling here, *See Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, __ U.S. __, 115 S.Ct. 2322 (1995); and (3) the previously cited decisions holding that the Lloyd's choice clauses are enforceable differ significantly on both factual and legal grounds from this action. These three considerations are explored throughout the analysis which follows.

1. Supreme Court Jurisprudence Establishes The Presumptive Validity Of Choice Clauses In International Agreements

Forum selection and choice of law clauses were historically disfavored. However, beginning with *The Bremen*, 407 U.S. 1 (1972), the Supreme Court has accorded clauses of that sort presumptive validity where the underlying transaction is fundamentally international in character. In *The Bremen*, an American oil company, seeking to evade its contractual agreement to an English forum and, by implication, English law, filed a suit in admiralty in federal court against the German corporation which was the other contracting party. Notwithstanding that the English court would enforce provisions of the contract which would exculpate the German party, and fully aware that an American court would not enforce those provisions, the Supreme Court gave effect to the *choice of forum* clause. In doing so, the Court recognized that in the modern commercial era, it was essential that American courts respect and enforce the decisions of contracting parties to resolve disputes in the tribunals of foreign countries:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn

> contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9.

The presumptive validity of choice of forum clauses found in international agreements was confirmed in *Scherk*, 417 U.S. 506 (1974), wherein the Court categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S. at 519. *Scherk* involved an agreement between an American company and a German citizen relating to the purchase and sale of several interrelated business enterprises which were organized under the laws of Germany and Liechtenstein. The contract contained a clause requiring arbitration before the International Chamber of Commerce in Paris of " 'any controversy or claim [arising] out of this agreement or the breach thereof.' " *Id.* at 508. The Court held that the clause was enforceable, even though it assumed for purposes of decision that the controversy would not be arbitrable under Supreme Court jurisprudence. *Id.* at 519-20.

In deciding *Scherk*, the Supreme Court emphasized the policy considerations on which it premised the presumption that such clauses were valid and enforceable:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages ... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

417 U.S. at 516-17.

This presumption of enforceability has been strengthened by subsequent Supreme Court decisions. *See Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (holding that *The Bremen* and *Scherk* "establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions," and enforcing arbitration clause in international agreement even assuming that a contrary result would be forthcoming in a domestic proceeding under the Sherman Act); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (enforcing forum selection clause in cruise line's passage contract ticket requiring litigation of all disputes in Florida and emphasizing a litigant's "special interest in limiting the fora in which it potentially could be subject to suit"); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322, 2328-29 (recognizing the strong presumption of validity for choice clauses in international agreements and enforcing foreign arbitration clause found in bill of lading).

2. The Presumption Is Not Absolute

This now settled presumption of enforceability is not absolute, however, because it may be overcome by a clear showing that the clauses are " 'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10. The Supreme

Court has construed this exception narrowly; forum selection and choice of law clauses may be "unreasonable" in four situations: (1) if their incorporation into the agreement was the result of fraud or overreaching, *Carnival Cruise Lines*, 499 U.S. at 595; *The Bremen*, 407 U.S. at 12-13; (2) if the complaining party "will for all practical purposes be deprived of his day in court," because of the grave inconvenience or unfairness of the selected forum, *The Bremen*, 407 U.S. at 18; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, *Carnival Cruise Lines* 499 U.S. at 595; or (4) if enforcement contravenes a strong public policy of the forum state, *The Bremen*, 407 U.S. at 15.

The first three circumstances are not presented here. First, a plaintiff seeking to avoid a choice provision on a fraud theory must plead a fraud going to the specific provision; "the teachings of *Scherk*, interpreting [*The Bremen*], require no less." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 960 (*citing Scherk*, 417 U.S. at 519 n. 14 (the fraud exception "means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion"); *The Bremen*, 407 U.S. at 15 (clause must be invalid due to fraud or overreaching)). Here, there is no contention by the Names that they were fraudulently induced into agreeing to the forum selection or choice of law clauses. Nor is the second circumstance presented here because it does not appear to be "gravely inconvenient" for the Names to litigate in England. *See Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2nd Cir.1993) (finding it not "gravely inconvenient for the ... Names to litigate in London; they found it convenient enough to travel there for their mandatory interviews, and, in any event, many of them presently are prosecuting actions there").[4]

[4]The record here does not disclose how many of the plaintiffs have ever been in litigation with Lloyd's, but plaintiffs' counsel represent that most have not.

The third situation permits disregard of a choice clause if the fundamental unfairness of the foreign forum deprives the plaintiff of any remedy. However, "it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States." *Id.* at 1363 (*citing Mitsubishi*, 473 U.S. at 629; *Medoil v. Citicorp*, 729 F.Supp. 1456, 1460 (S.D.N.Y.1990). Instead, the issue on this facet of the inquiry is whether the foreign law selected by the parties is so fundamentally unfair as to present the danger that the plaintiff "will be deprived of any remedy or treated unfairly." *Piper Aircraft Co. V. Reyno*, 454 U.S. 235, 255 (1981), *reh'g denied*, 455 U.S. 928 (1982). Although in certain situations English substantive law may not be as favorable to a party as would American law, United States courts have consistently found English tribunals to be neutral and just forums. *See The Bremen*, 407 U.S. at 12; *Roby*, 996 F.2d at 1363; *Mitsubishi*, 473 U.S. at 634: *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479 (1989); *Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 829 (5th Cir.1986); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 515 (9th Cir.1988). Thus, plaintiffs would not be effectively "denied their day in court" were they forced to present their claim in front of an English tribunal.

The fourth *Bremen* factor is more problematic, however. As the leading authority in support of the Lloyd's choice clauses observed: "[T]here is a serious question whether United States public policy has been subverted by the Lloyd's clauses." *Roby*, 996 F.2d at 1363. The concerns which prompted that comment from the Second Circuit necessitate some explanation; and it is necessary to explain why, in this action, that issue is far more than "a serious question."

3. The Presumption Of Validity For Forum Choice And Choice of Law Clauses Under Supreme Court Jurisprudence Does Not Apply In This Case

a. The Combined Effect of the Choice of Forum and Choice of Law Clauses Is to Waive Substantive Statutory Rights

The Supreme Court has made quite clear that where " 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies .... *we would have little hesitation in condemning the agreement as against public policy.*' " *Vimar*, 115 S.Ct. at 2330 (emphasis added) (*quoting Mitsubishi Motors*, 473 U.S. at 637, n. 19) (*citing Knott v. Botany Mills*, 179 U.S. 69 (1900) (nullifying choice-of-law provision under the Harter Act, the statutory precursor to COGSA, where British law would give effect to provision in bill of lading that purported to exempt carrier from liability for damage to goods caused by carrier's negligence in loading and stowage of cargo)). This significant explication of the fourth measure of unreasonableness first was made in *Mitsubishi Motors*. It was reiterated in *Vimar* in 1995. On both occasions, it was made for the purpose of explaining the confines of the decisions in *The Bremen* and its progeny.

This limitation is quite logical when it is remembered that in *The Bremen* and its progeny, the Supreme Court construed and applied *only* choice of forum clauses (as opposed to *both* choice of forum clauses *and* choice of law clauses). *See Scherk*, 417 U.S. at 519-20 (upholding requirement that United States company submit its United States securities law claims to arbitration in a foreign forum where Illinois law was to apply); *Mitsubishi Motors*, 473 U.S. at 640 (compelling arbitration of United States antitrust claims under the Sherman Act in

Japanese forum); *Vimar*, 115 S.Ct. at 2329-30 (enforcing clause which mandated arbitration in Japan where it was not yet decided what law governed the proceedings and where the district court retained jurisdiction over the case to ensure that substantive legal rights are enforced); *The Bremen*, 407 U.S. at 15 (upholding provision in a maritime towage contract mandating all disputes arising out of the contract be heard in London, and merely presuming that English law would apply).

Clearly, where a court is enforcing only a choice of *forum* clause, the plaintiffs retain the same substantive rights even though they must resolve them in an alternative forum. However, where both choice of forum and choice of law clauses are involved, the substantive rights themselves are derogated. The Supreme Court consistently has guarded against the occurrence of that situation. *See Scherk*, 417 U.S. at 519 n. 13 (noting that the case did not present a situation where an arbitration agreement designating "arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction" since it was specified that Illinois law would apply); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 229, *reh'g denied* 483 U.S. 1056 (1987) ("The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of enforcing the parties' statutory rights"); *Mitsubishi Motors*, 473 U.S. at 637, n. 19 (where "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies ..., we would have little hesitation in condemning the agreement as against public policy").

The Supreme Court recently reiterated is commitment to preventing prospective waivers of statutory rights in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S.Ct. 2322

(1995), a case involving a foreign arbitration clause in a bill of lading. Under the Carriage of Goods by Sea Act (COGSA), any clause in a bill of lading "lessening [a carrier's] liability" is void. 46 U.S.C. § 1300 *et seq.* The plaintiff, an insurer that had paid claims arising from the damage to goods during shipment by the defendant carrier, argued that there was no guarantee that the foreign arbitrators would apply COGSA and that the carrier's liability to the cargo might be reduced. Because it had not been established what law the foreign arbitrators would apply and because the district court had retained jurisdiction and would have an opportunity to later ensure that the plaintiff's substantive rights under COGSA were addressed[5], the Court enforced the arbitration clause. *Id.* at 2330 (*quoting Mitsubishi Motors*, 473 U.S. at 637 n. 19, supra). In so doing, however, the Supreme Court made clear that it would not sanction enforcement of choice of forum and choice

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[5]In both *Mitsubishi* and *Vimar*, the Court found significance in the fact that, after the foreign arbitration proceeding, the district court would retain jurisdiction to ensure that laws and policies of the United States had been respected. *See Mitsubishi*, 473 U.S. 614, 638 ("Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the ... laws has been addressed"); *Vimar*, 115 S.Ct. 2322, 2329-30 ("The district court has retained jurisdiction over the case and 'will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed' ") (*quoting Mitsubishi*, 473 U.S. at 638).

In this case, the district court can take such a role. Notwithstanding that the Supreme Court has categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute," *see Scherk*, 417 U.S. at 519, the forum selection and choice of law clauses in the General Undertaking are distinguishable from foreign arbitration clauses. Here, enforcement of the choice clauses mandates the dismissal of the plaintiffs' claims with no residual jurisdiction remaining in United States courts at all. There is no "second chance" for United States courts to ensure that U.S. public policy is respected and complied with.

of law clause which, taken together, operate to deprive an American plaintiff of a Congressionally conferred right.

The waiver of rights threatened in *Vimar*, and cautioned against in *Scherk* and *Mitsubishi Motors*, is precisely what would occur here if the choice clauses are upheld. It is undisputed that an English court, applying the choice of law clause in the General Undertaking, will not apply the securities laws of the United States which the plaintiffs' seek to secure by injunction in this case. Declaration of Kenneth Steward Rokison at §§ 45-55 (Exh. G to Plaintiff's brief In Opposition to Lloyd's Motion to Dismiss). English conflict of law rules do not permit recognition of foreign tort or statutory law. *See Roby*, 996 F.2d at 1362. Thus, if the plaintiffs' claims in this case were dismissed on the basis of the Lloyd's choice clauses, plaintiffs would be deprived of the protections afforded to them by the securities laws of the United States. This court should, therefore, "not hesitate" to forestall enforcement of the Lloyd's choice of forum and choice of law clauses.

b. Congress Expressed A Clear Statutory Statement Of Contrary Public Policy

A second distinguishing feature here is that here Congress has made a clear, unequivocal statutory statement which is inconsistent with the enforcement of the choice clauses. The securities law of this country contain anti-waiver provisions which clearly state that, without exception, no substantive rights under either the 1933 or 1934 Acts may be waived by any contract provision. The 1933 Act provides that "[a]ny ... stipulation ... binding any person acquiring any security to waive compliance with any provision of this subchapter ... shall be void." 15 U.S.C. § 77n. Similarly, the 1934 Act states, "[a]ny ... stipulation ... binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder ... shall be void." 15 U.S.C. § 78cc(a).

In neither *The Bremen* nor any ensuing decision was the Supreme Court called upon to apply the *Bremen* rule where Congress has expressed so clearly a public policy that is inconsistent with the enforcement of forum choice and choice of law clauses. The anti-waiver provisions of the securities laws are targeted directly at the precise type of choice of law and forum clauses at issue in this case, and the anti-waiver provision on its face, and standing alone, necessitates that Lloyd's choice clauses not be given effect because they are void. Nothing in the Supreme Court decisions on which Lloyd's bases it position permits a federal court to ignore an unambiguous Congressional directive that United States laws be available to United States investors.

The well-settled rule in the Fourth Circuit, as explained in *Union Insurance Society v. Elikon*, 642 F.2d 721 (1981), is that where Congress has expressed a clear statement in a statute which is inconsistent with the enforcement of choice of forum and choice of law clauses, those clauses must not be enforced. *Elikon* arose out of a contract, governed by the COGSA, to sell American-manufactured goods overseas. The bill of lading at issue provided that the laws of Germany would apply and that such actions were to be brought exclusively in West Germany.

The Fourth Circuit held that this choice clause was inconsistent with a Congressional policy expressed in § 3(8) of COGSA which stated "any clause ... in a contract of carriage relieving the carrier or the ship from liability ... arising from negligence ... or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." *Elikon*, 642 F.2d at 723 (*quoting* 46 U.S.C. § 1303(8)).

In reaching that result the Court of Appeals distinguied the *Bremen* line of cases:

> While *The Bremen* holds that forum selection clauses are presumptively valid, particularly in international transactions, it only expressed this view in the absence of any congressional policy on the subject, much less a contrary congressional policy. COGSA applies to [the] bills of lading in this case, but those bills clash with the statute on their face by their provision for German law ... Congress intended COGSA to ameliorate this very difficulty of bills of lading with one-sided form provisions ... We think the general policy here [that forum selection clauses are generally to be upheld] must recede before the specific policy enunciated by Congress through COGSA.

Elikon, 642 F.2d at 724-25. In *Vimar*, 115 S.Ct. 2322 (1995), a COGSA case with substantially similar facts as *Elikon*, the Supreme Court rejected the Fourth Circuit's analysis under the specific facts presented in *Elikon*. The Court in *Vimar*, however, rejected only the reasoning under the facts presented, and not the legal proposition articulated in *Elikon*. Thus, both decisions continue to stand for the undeniable proposition that where the enforcement of choice clauses in international agreements would conflict with a clear expression of Congressional policy, the clauses are *void*.

Similarly, the choice clauses in the General Undertaking should not be enforced because, given effect in tandem, they are directly contrary to a specific policy enunciated by Congress in the anti-waiver provisions of the securities laws. The Supreme Court and Fourth Circuit analyses thus instruct that the Lloyd's choice clauses not be enforced here.

c. Effect Of Congressional Statement Of Contrary Public Policy

Where clear statutory statements by Congress stand contrary to the enforcement of international choice of law and

forum clauses, as do the anti-waiver provisions of the securities laws, the analysis under the fourth (or "public policy") "exception" to the presumption of enforceability, is altered. The precise effect, however, that such Congressional statements have upon the analysis under *The Bremen* and its progeny is unclear. There are two possibilities. First, the anti-waiver provisions may be viewed as entirely precluding the analysis of whether the choice clauses contravene a strong public policy of the United States. In the alternative, the anti-waiver provision may be viewed merely as evidence of the importance and prominence of the public policies underlying the securities laws.

The Names argue, as does the SEC in its *amicus curiae* brief, that the anti-waiver provisions are not simply an expression of public policy that favors United States securities laws unless other comparable laws are available. Rather, they assert that the provisions are an express and unequivocal directive that the rights and obligations under the securities laws cannot be waived. Since this determination has been made by Congress, the courts are not free to substitute their own public policy determinations. Because that view comports with basic principles of statutory construction and the fundamental teaching of the Supreme Court on the subject, it must prevail here.

The analyses in both *Vimar*, 115 S.Ct. 2322, and *Elikon*, 642 F.2d 721, indicate that approach to be the correct one. In *Elikon*, after determining that the choice of law and forum clauses directly conflicted with a provision of COGSA, the Fourth Circuit ended its analysis under *The Bremen* line of cases. 642 F.2d at 724-25 ("While *The Bremen* holds that forum selection clauses are presumptively valid, particularly in international transactions, it only expressed this view in the absence of any congressional policy on the subject, much less

a contrary congressional policy''). The *Elikon* court found that it was unnecessary, in light of the relevant congressional directive, to conduct an analysis of whether the choice clauses at issue contravened the specific public policies behind the relevant provisions of COGSA. *See also Vimar*, 115 S.Ct. at 2329 (analyzing whether the choice clauses at issue contravened the specific public policies of COGSA *only after* concluding, contrary to *Elikon*, that the congressional directive in COGSA was not relevant to the facts presented, and thus not dispositive).

For the same reasons, the court concludes in this action that the anti-waiver provisions of the securities laws of the United States are controlling, and that it is neither permissible nor necessary for this court to substitute its own public policy determinations for those made by Congress. Thus, in the face of this clear congressional mandate, the choice clauses found in the General Undertaking are void and unenforceable.

Even if, however, as Lloyd argues, a congressional statement such as the anti-waiver provision should be viewed merely as *evidence* of the importance and prominence of the public policies underlying the securities laws, rather than as *entirely precluding* the public policy analysis, the choice clauses in the General Undertaking should not be enforced.[6]

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[6]The view that statutory directives, such as the anti-waiver provisions of the securities acts, go towards proving the *weight* of the relevant public policies, as opposed to *negating* entirely the public policy analysis under *The Bremen*, is supported by *Scherk, 417 U.S. 506 (1974). In Scherk*, the Supreme Court encountered the anti-waiver clause of the securities acts in the context of an arbitration clause mandating arbitration in a foreign forum. The plaintiffs sought to set-aside the requirements of the arbitration clause on the grounds that it violated the anti-waiver provisions of the 1934 Act. After recognizing the presence of the anti-waiver provisions, the Supreme Court continued on to examine both the public policies underlying the Securities Acts and the United States Arbitration Act, 9 U.S.C. § 1, and whether the arbitration clause contravened those policies.

(footnote continued)

That analysis begins with the language in *The Bremen*: "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 156. According to *Roby*, "[b]y including anti-waiver provisions in the securities laws, Congress made clear its intention that the public policies incorporated into those laws should not be thwarted." *Roby*, 996 F.2d 1364.

It appears that the proper method for conducting this public policy analysis under *The Bremen* is a two step inquiry. First, the court must determine the public policies which underlie the United States securities laws. Second, the laws and remedies provided by the foreign choice forum must be evaluated in an effort to determine whether they contravene these United States policies. *See Pasztory v. Croatia Line*, 918 F.Supp. 961, 966 (E.D. Va. 1996) ("In deciding the enforceability of the forum selection clause in the case sub judice, this Court is compelled to follow the directives of [*Vimar*]. Accordingly, we will consider: (1) whether the disputed clause is void because of [conflict with COGSA]; and (2) whether the substantive law the foreign forum would apply if the disputed clause were enforced is less than what COGSA guarantees"); *Roby*, 996 F.2d 1353, 1364 ("We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors"); *Vimar*, 115 S.Ct. 2322, 2329-30 (comparing the procedures and remedies available

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(footnote continued)

Id. at 513-519. However, on *Scherk* the Court was considering two Congressional policies: arbitration and securities laws.

It appears that this interpretation of the effect of congressional statements of public policy has now been recently rejected both by the Fourth Circuit and the *Supreme Court itself*. *See Vimar*, 115 S.Ct. 2322 (1995); *Elikon*, 642 F.2d 721 (1981).

under COGSA with those available under Japanese Hague Rules in light of the policies underlying COGSA); *Mitsubishi Motors*, 473 U.S. at 633-635 (examining the public policies under United States anti-trust laws and evaluating the specific procedures and remedies available under foreign arbitration clause in light of these policies); *Scherk*, 417 U.S. at 513-19 (examining both the public policies underlying the Securities Acts and the United States Arbitration Act, 9 U.S.C. § 1, in order to determine whether the foreign forum arbitration clause contravened those policies).

i. Public Policies Underlying Security Acts.

Many courts have explored the public policies on which the Security Acts are based and the interests which those laws seek to protect. The framers of the securities laws were concerned principally with reversing the common law rule favoring "caveat emptor." *See e.g., SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1025 n. 51 (D.C.Cir.1978), *cert. denied*, 439 U.S. 1071 (1979). To this end, the securities laws are aimed at "prospectively protecting American investors from injury by demanding 'full and fair disclosure' from issuers." *Roby*, 996 F.2d at 1364; *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28, *reh'g denied*, 423 U.S. 884 (1975); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). "Private actions exist under the securities laws not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors." *Roby*, 996 F.2d at 1364 (*citing Randall v. Loftsgaarden*, 478 U.S. 647, 664, (1986); *Abrahamson v. Fleschner*, 568 F.2d, 862, 872 (2nd. Cir.1977), *cert. denied*, 436 U.S. 913 (1978)). In sum, the "Commission's basic philosophy ... has been one of disclosure." Loss & Seligman, Fundamentals of Securities Regulation (Third Ed.) at 437 (1995). That, of course, is what the plaintiffs seek here.

ii. Whether The Public Policies Underlying The Securities Acts Would Be Contravened By Applying English Law.

The courts which have enforced the choice clauses in the General Undertaking did so only after satisfying themselves that the American Names had "adequate remedies" in England against Lloyd's and other Lloyd's-related persons and entities for the claims which were before those courts. *See Roby*, 996 F.2d at 1365 ("the Roby Names have adequate remedies in England to vindicate their statutory fraud and misrepresentation claims"); *Bonny*, 3 F.3d at 162 ("enforcing the clauses here simply means that plaintiffs will have to structure their case differently than if they were proceeding in federal district court"); *Riley*, 969 F.2d at 958 ("Riley will not be deprived of his day in court"); *Pasztory*, 918 F.Supp. at 966 (enforcing choice of forum clause after satisfying itself that the plaintiff "failed to establish that the substantive law the foreign tribunal would apply is less than what COGSA guarantees, as required by the second half of the [*Vimar*] test"). These courts acknowledged that, under *The Bremen* and its progeny, "[a] contractual choice-of-form clause should be held unenforceable if enforcement would contravene a strong public policy [of United States securities laws], whether declared by statute or by judicial decision." *The Bremen*, 407 U.S. at 15; *see Roby* 996 F.2d at 1363 (quoting *The Bremen*, 407 U.S. at 18); *see also Bonny*, 3 F.3d at 160; *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 317 (4th Cir.1982) (choice of forum clause is unenforceable where "enforcement would effectively deprive that party of his day in court").

In each instance, however, the court found that the plaintiff would be able to pursue damages or would have available remedies that would suffice. This court finds that the public policies of the securities laws would be contravened by the application of English law on the facts of this action, because

English law is inadequate to prospectively deter British issuers from exploiting American investors through inadequate disclosure. Although *Roby* suggests otherwise, *Roby*, 996 F.2d 1365-66, it is not on point because that court was not confronted with an action seeking prospective disclosure under United States securities laws.

Unlike the situation in *Roby*, the plaintiffs in this action seek disclosure of certain financial information pursuant to §§ 14(a) and 10(b) of the 1934 Act and the applicable SEC rules. These provisions function as prophylactic rules requiring, as they do, prospective disclosure by issuers of equity securities. SEC Rule 14a-3, 17 C.F.R. § 240, provides that:

> [N]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A ...

Schedule 14A to the regulations specifies in 22 items the extensive information required to be disclosed in connection with the solicitation of a proxy statement. Most relevant to the Names' requests is item 13, entitled "Financial and Other Information." This item details the financial statements and other disclosures which must accompany a proxy statement. Similarly, SEC Rule 10b-5 provides for criminal liability for the nondisclosure of material fact in conjunction with the purchase or sale of any security. In *SEC v. National Securities*, 393 U.S. 453 (1969), the Supreme Court held that Rule 10b-5 could be applied to misstatements in proxy statements, even though proxy solicitation was governed by specific SEC rules under § 14a.

English law would not provide plaintiffs with any similar protections by way of disclosure requirements, and thus its appli-

cation would contravene United States public policy. To begin with, Lloyd's enjoys a special exemption from the English securities laws. *See* Financial Services Act of Parliament § 42 (1986). Thus, even if the English securities law *did* provide an adequate disclosure remedy, it would not appear to apply in this case. *See* Wright Decl. §§ 7, 8. Even if the securities laws of the United Kingdom applied, however, the remedies they provide are not consistent with the strong public policy in the federal securities laws in favor of broad-based, prospective disclosure. The only provision of the Financial Services Act (FSA) which provides an investor with any opportunity for prospective disclosure is § 61. Under this provision, an investor may file a complaint with the Secretary of State, who may in turn apply to the High Court for an injunction restraining the contravention "by any person" of any provision of § 47 of the FSA.[7] There is no private cause of action under § 61. Such an injunction could possibly prevent Lloyd's from proceeding with the R&R plan and the settlement offer unless and until the contravention of § 47 had been properly remedied.

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[7]Section 47(1) of the FSA provides:

> Any person who—
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> (a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts; or
>
> (b) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive,
>
> is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made or from whom the facts are concealed) to enter or offer to enter into, or to refrain from entering or offering to enter into, an investment agreement or to exercise, or refrain from exercising, any rights conferred by an investment.

While at first blush the injunctive relief under § 61 may seem somewhat akin to that provided for under United States law, upon closer examination the insufficiencies and inadequacies of the § 61 remedy are apparent. First, and most significantly, § 61 would require the plaintiffs to file a complaint with, and rely upon action by, the very same government which has officially supported the Lloyd's R&R plan. In fact, in this very case the British Government filed an *amicus curiae* brief in support of Lloyd's motion to dismiss, which indicates that government's full support and approval for the R&R plan. Requiring the plaintiffs to rely upon a department of the British government to take action on their behalf with respect to the lack of disclosures made in conjunction with the R&R plan, when that very government has opposed them in this litigation concerning that very plan, would be tantamount to providing no disclosure remedy at all.

Section 61 of the FSA is also an inadequate disclosure remedy because it only allows for injunctive relief based on *affirmative misstatements* or the "*dishonest concealment*" of material facts. *See* FSA §§ 47, 61 (courts may only enjoin contraventions of § 47, which provides liability for person who "makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts ..."). Thus, to obtain an injunction pursuant to § 61 based upon the non-disclosure of necessary information, the plaintiffs would be required to prove "dishonest concealment." This contravenes the prophylactic nature of § 14(a), which affirmatively mandates the disclosure of all relevant financial information without any showing by prospective investors. By providing for extensive, mandatory disclosure in §§ 14(a) and 10(b), and by including the anti-waiver provision in the securities acts, Congress has recognized and emphasized the importance of full, prospective disclosure in securities transactions. English securities law recognizes no such public

policies, and thus its application to this case would contravene U.S. public policy.

Without adequate remedy from English securities law, plaintiffs would be forced to rely on general English law to provide relief. This general law is similarly inadequate to provide the requested relief, and thus its application to this case would contravene U.S. public policy. To begin with, there is no doctrine under general English law which would provide a basis for an English court to compel the disclosure of the information sought by the plaintiffs. Lloyd's argues, however, that English law provides a number of potential alternative remedies including actions for fraud, damages, judicial review proceedings and private law actions for *ultra vires* and bad faith acts. These alternative remedies are inadequate in this case for two reasons: (1) the plaintiffs have sought only disclosure of information, and not any of these other remedies; and (2) there are serious questions as to the actual availability of these remedies to the plaintiffs.[8]

In sum, plaintiffs will have no adequate remedies in England for the non-disclose claims they assert in this case. The enforcement of the choice clauses "would contravene a strong

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[8]A fraud claim may be unavailable to plaintiffs because disclaimers throughout the R&R plan and settlement proposal would vitiate a claim of "reasonable reliance." Lloyd's has statutory immunity from damages actions except for bad faith conduct under § 14 of the Lloyd's Act of 1982 from damages actions. As for judicial review proceedings and private law actions, an English court has recently decided that neither action lies. *See The Queen v. The Council of the Society Lloyd's, ex parte Susan Johnson and Others*, High Court of Justice, Q.B. (August 16, 1996) (holding that the court did not have jurisdiction for judicial review, that the R&R plan did not constitute an *ultra vires* act, and that there was no evidence of bad faith on the part of Lloyd's).

After the preliminary injunction hearing, Lloyd's CEO filed an affidavit seeking to ameliorate this problem, but the stipulation therein is insufficient to that end.

public policy'' of the United States securities law, and thus the clauses are void and unenforceable. *The Bremen*, 407 U.S. at 15.

4. The Cases In Which Federal Courts Have Enforced The Lloyd's Choice Clauses Are Both Factually Distinguishable, And Incorrect Legally

a. Factual Distinctions

The decisions on which Lloyd's relies are not controlling for the additional reason that they involved facts and claims materially different from those at issue in this action. In those cases, the plaintiffs were asserting that they had been fraudulently induced to enter their original Lloyd's investments; that they should be granted recision of the agreements and protection from policyholder claims; and that they were entitled to damages. *See Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir.1993); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2nd Cir.); *Riley v. Kingsley Underwriting Agencies Ltd.*, 969 F.2d 953 (10th Cir.); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir.1995). In some cases, the Names also sought an injunction to prevent Lloyd's from drawing on their letters of credit. *See e.g., Riley*, 969 F.2d at 956; *Bonny*, 3 F.3d 1 at 157. Finally, the plaintiffs in those cases sought damages from other Lloyd's-related persons and entities, such as Members' Agents, Managing Agents, and Underwriting Agents.

In this action, the plaintiffs do not allege a claim for fraud in the inducement. Nor do they seek to avoid obligations to policyholders. And, they do not seek damages. Instead, here the plaintiffs seek only injunctive relief to compel Lloyd's to make the disclosures guaranteed to them by the securities laws of the United States, adequate time to consider the dis-

closures, and an opportunity to make a fully informed decision about whether to accept or reject the settlement offer which is central to the R&R plan.

The differences in the claims brought and the relief sought alters the analysis under the "public policy" exception to the presumption of enforceability for international choice clauses. Because the plaintiffs here bring their claims under the disclosure provisions of the Securities Acts, the policies underlying the prospective disclosure requirements take on a different significance because disclosure in advance is a core policy of the securities laws. *See supra*, section ii (evaluation of why the application of English law in this case would contravene the public policies underlying the disclosure requirements of U.S. securities law).

This action is also factually distinguishable from the decisions on which Lloyd's relies because a basic factual premise which was important to the holdings in those decisions that the application of English law would not contravene U.S. public policies — namely that the SEC had consented to Lloyd's conduct or impliedly granted Lloyd's an exemption from U.S. security laws — is no longer tenable. Most of the previous decisions relied heavily upon the SEC's silence in determining that the choice of forum and choice of law clauses in the General Undertaking were enforceable:

> We believe that [the policy concern of deterring issuances without disclosing sufficient material information to permit investors to make informed decisions] is somewhat diluted in this case because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has decided that Lloyd's' means test meets the requirements of [the regulations]. We are extremely reluctant to dispute the SEC's ap-

> parent judgment that the [Names] are sophisticated enough that they do not need the disclosure protections of the securities laws.

Roby, 996 F.2d at 1365-66.[9] Whether that understanding of the SEC's position was correct at the time is beside the point because the SEC has filed *amicus curiae* briefs in both *Richards* and this action, asserting that the choice of law and forum clauses in the General Undertaking are unenforceable because the application of those clauses would contravene the public policies behind federal securities laws. *See* Memorandum of the Securities and Exchange Commission, Amicus Curiae; Brief of the Securities and Exchange Commission, Amicus Curiae in the case of *Richard v. Lloyd's of London*.

For the foregoing reasons, the court does not consider that it is proper to follow the authority on which Lloyd's relies to urge enforcement of its choice clauses. Moreover, and of great significance, each of four decisions of the Courts of Appeals addressing the enforceability of the Lloyd's choice clauses was decided *before* the Supreme Court clarified *The Bremen* line of cases in *Vimar*, 115 S.Ct. 2322. In *Vimar*, the Supreme

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[9]*See also, Richards v. Lloyd's of London*, Case No. 95-55747 (S.D.Ca.1995).

> However, none of plaintiffs' documents negates the fact that the SEC has never publicly taken any action to enforce federal securities laws against Lloyd's, despite the fact that the SEC has at various times and by various persons been apprised of Lloyd's practices and of some of the allegations against Lloyd's. While the inferences drawn by the *Roby* court from the SEC's inaction may appear somewhat overstated, the Court does not find plaintiffs' evidence sufficient to controvert the conclusion of the Second Circuit that the SEC's inaction undercuts or dilutes the strength of the policy argument that insufficient deterrence exists for Lloyd's with respect to adequate disclosure under English law.
> ER 102:23-34.

Court has had the last word: where the enforcement of forum choice and choice of law clauses would be contrary to an unequivocal congressional statutory statement, and where the clauses would in tandem serve to waive a plaintiff's substantive statutory rights, the choice clauses are *unenforceable and void*. That principle controls the result here.

II. FORUM NON CONVENIENS

Alternatively, Lloyd's seeks dismissal under the common law doctrine of *forum non conveniens*.[10] For the reasons which follow, the alternative motion will be denied.

Notwithstanding the plaintiff's argument to the contrary, *See* Plaintiff's Brief in Opposition To Lloyd's Motion To Dismiss at 24, the *forum non conveniens* analysis is a separate and distinct inquiry which must be made before this action can be retained in this forum. In *Elikon*, 642 F.2d at 725, the Fourth Circuit determined that the district court erred in considering *only* whether the forum choice clauses were enforceable and

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[10]Lloyd's does not contend that venue for plaintiffs' claims under the U.S. securities laws is improper under 28 U.S.C. § 1391(d) and § 27(a) of the Securities Exchange Act, as amended, 15 U.S.C. § 78aa. Venue is proper in this case under § 1391(d), because an alien defendant may be sued in any district in the United States. In addition, courts have generally given § 27(a) broad application and have sustained a plaintiff's choice of venue. *See, e.g., Lovenheim v. Iroquois Brands, Ltd.*, 618 F.Supp. 554, 558 (D.D.C.1985) (the mailing of a proxy statement that allegedly violates the Exchange Act into a judicial district by interstate mail is sufficient by itself to establish venue in that district under § 27(a) of securities acts); *Mayer v. Development Corp. Of Am.*, 396 F.Supp. 917, 928-30 (D.Del.1975).

In addition, at this time, Lloyd's has not made a motion for transfer pursuant to 28 U.S.C. § 1404(a). A district court may properly grant a transfer under § 1404(a) upon a lesser showing of inconvenience than is necessary under the doctrine of forum non conveniens, where *dismissal* is the end result. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

remanded the case so that the district court could determine whether "the Eastern District of Virginia is a *forum non conveniens* for this litigation." *Id.* The Court of Appeals explained that it was not sufficient to rely only "on *The Bremen* and merely not[e] the foreign nationality of the parties as an argument a fortiori in support of its declination of jurisdiction." *Id.* Nonetheless, there is some overlap between the analysis under *The Bremen* and the *forum non conveniens* analysis. Therefore, the latter analysis somewhat flows from the former and hence the *forum non conveniens* analysis will be somewhat truncated.

A. The Legal Standard

Briefly stated, the doctrine of *forum non conveniens* as originally developed is that, "where two or more courts in different forums can exercise jurisdiction over the cause of action, if an action is brought in an inconvenient forum the court of that forum has the power to dismiss suit." 1A Moore's Federal Practice § 0.204 at 2163. The decision is one entrusted to the discretion of the district court and requires the balancing of several interests:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981); *See Kontoulas v. A.H. Robins Company, Inc.*, 745 F.2d 312 (4th Cir.1984); *Hodson v. A.H. Robins*, 715 F.2d 142, 144 (4th Cir.1983).

In *Piper Aircraft*, 454 U.S. 235, 241 & n. 6, the Supreme Court set forth the criteria that control consideration of a motion to dismiss on the ground of *forum non conveniens*. The analysis depended upon an exploration and balancing of relevant public and private factors. *Id.* (citing *Gulf Oil Corp. V. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947)).

The burden is on the movant: (1) to overcome the presumption which favors the plaintiff's chosen forum,[11] and (2) to prove both the availability and superiority of an alternative forum.[12] The Supreme Court has rejected the proposition that "where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal [i]s always appropriate." *Piper*, 454 U.S. at 249 (*citing Koster*, 330 U.S., at 527). "That is one, but only one, factor which may show convenience." *Koster*, 330 U.S. at 527. And, the burden on Lloyd's is not carried unless the balance of the several interests strongly favors dismissal. *Kontoulas*, 745 F.2d at 315 (the relevant public and private interests must "*strongly favor*" a specific, adequate, and available forum to warrant dismissal based on *forum non conveniens*) (emphasis added).

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[11]*See, e.g., Piper*, 454 U.S. 235, 255-56 (upholding district court's holding that there "is ordinarily a *strong presumption in favor of the plaintiff's choice of forum*, which may be overcome only when the private and public interest factors clearly point toward trial in the alternative forum") (emphasis added); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947) ("[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown").

[12]*See Kontoulas*, 745 F.2d at 315 ("A *forum non conveniens* dismissal must be based on the finding that, when weighed against the plaintiff's choice of forum, the relevant public and private interests *strongly favor* a specific, adequate, and available alternative forum") (*citing Verba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir.1983), *reh'g denied* 724 F.2d 976 (1984) (emphasis added).

B. Application of the Legal Standard: The Balancing Of Public And Private Factors

The private factors identified in *Piper Aircraft* are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of the unwilling witnesses and the costs of obtaining attendance of willing witnesses; (3) the possibility of view of the premises, if a view is appropriate to the action; and (4) all of the problems that make trial of a case easy, expeditious and inexpensive. *See Piper*, 454 U.S. 235; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The public factors to be considered are: (1) the administrative difficulties flowing from court congestion; (2) local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*

Where, as here, it is not claimed that another district within the United States would be a more appropriate or convenient forum, the proper forum comparison is between the United States as a whole and England. Thus, contrary to the thrust of Lloyd's argument, there is no need to make a comparison of the Eastern District of Virginia and England. *See Piper Aircraft*, 454 U.S. 235, 260-61 (in comparing the appropriateness of the chosen district court forum and the defendant's requested Scottish forum, the Court approached the issue as presenting a choice between the Scottish forum and an "*American* court" or "the *United States*") (emphasis added); *Mercier v. Sheraton Int'l., Inc.*, 935 F.2d 419, 429-30 (1st Cir.1991), *cert. denied*, 508 U.S. 912 (U.S. citizen plaintiffs asserting breach of contract claims in diversity case were not residents of forum district; court of appeals reversed *forum*

non conveniens dismissal based upon comparison between U.S. as a whole and the foreign country); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir.1991) (in considering motion to dismiss on *forum non conveniens* grounds, court focused on the United States as a whole), *cert. denied*, 502 U.S. 1095 (1992).

Application of the *Piper Aircraft* analysis to this action yields the conclusion that the United States is the appropriate forum. First, the United States has a strong interest in enforcing its own securities laws which, as explained above, apply in this action. There is also no concern here that the district court will need to apply foreign (English) law, or, as discussed further below, that there is a conflict of laws.

In addition, the evaluation of the relative ease of access to evidence, and the relative costs of obtaining attendance of willing witnesses, does not "strongly favor" England as a forum. Whereas the record bespeaks the existence of vast volumes of documents in England, that fact does not weigh heavily here because the issue here is the need for compliance with disclosure provisions of the federal securities laws, not an assessment of liability for past conduct. Hence, recourse to the vast quantity of documents in Lloyd's possession will not be necessary. In any event, federal courts have it within their power to see that paper discovery does not obscure the purpose of the action. And, that power will be exercised here as it is in all cases in this district. A majority of the plaintiffs' witnesses are residents of the United States. Several of Lloyd's' witnesses are also residents of the United States. Of course, a good number of Lloyd's witnesses will be citizens of England, but that fact alone does require dismissal. Moreover, the claims asserted in this action do not call for voluminous deposition discovery. And, in any event, that facet of litigation is easily controlled by the court.

Finally, this case presents no danger of unfairly burdening potential jurors in an unrelated forum. There currently is no demand for a jury trial and there likely will be none, given the nature of the claims presented. But, if a jury trial should become necessary, it would not be an unfair burden for American jurors to hear the claims of American citizens under this country's securities laws.

The decisions which have dismissed claims under the United States securities laws on the basis of the *forum non conveniens* doctrine are far different than the facts presented in this action. For example, in *Howe*, 946 F.2d 944, on which Lloyd's principally relies, the defendant was a Canadian company which had neither marketed nor sold securities in this country. An American investor wishing to purchase the defendant's securities had to travel to Canada to purchase them, and all of the relevant events surrounding the plaintiff's claims took place in Canada. It was "undisputed" that no resident of the United States "ha[d] knowledge relevant to the matters alleged in the amended complaint," other than the plaintiff himself. *Id.* at 951. It was also undisputed that "Canadian courts will either apply American law ... or they will apply Canadian laws that offer shareholders somewhat similar protections ..." *Id.* at 952. Thus, in dismissing the case on the ground of *forum non conveniens*, the First Circuit merely held that an American who purchases his shares in a foreign country, based on alleged misrepresentations that were made abroad, is required "to bring his case abroad in a nation that offers its shareholders roughly equivalent protections." *Id.* at 953.

In this action, there is a much greater connection between the events alleged and the United States. Lloyd's actively has recruited American citizens in this country to become Names and, in response, American citizens invested significant capital

in the Lloyd's market. Further, Lloyd's R&R plan has been actively marketed in the United States, and acceptances by U.S. Names have been actively solicited. The record establishes that, pursuant to its effort to raise capital for Equitas and to secure the acceptance of R&R, Lloyd's has sent numerous letters, pamphlets, brochures, videotapes, and countless other documents to the American Names in the mail of the United States providing them with information and urging them to accept the R&R plan. This conduct alone may be enough to establish the United States as an appropriate forum.[13] The Lloyd's offer can be accepted by mail from the United States. Lloyd's officers and employees, including its Chief Executive Officer, have traveled to the United States on many occasions to both initially recruit American Names, and to meet with groups of American Names in an effort to persuade them to accept the R&R plan. In addition, Lloyd's has hired several public relations firms in the United States to contact the American Names, encourage them to accept the plan, and to monitor the level of acceptance for the plan in the United States.

Lloyd's also asserts that dismissal is appropriate because the courts of England afford adequate remedies. The plaintiffs assert the contrary. The issue respecting the adequacy of remedies in England is to be assessed in perspective of the observation of the Supreme Court in *Piper Aircraft* that:

> We do not hold that the possibility of an un-

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[13] *See Tvenheim v. Iroquois Brands, Ltd.*, 618 F.Supp. 554, 558 (D.D.C.1985) (the mailing of a proxy statement that allegedly violates the Exchange Act into a judicial district by interstate mail is sufficient by itself to establish venue in that district under § 27(a) of securities acts); *Mayer v. Development Corp. Of Am.*, 396 F.Supp. 917, 928-30 (D.Del.1975) (same).

> favorable change in law should never be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interest of justice. In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

Piper Aircraft, 454 U.S. at 254-55 (footnote omitted).

That observation, in turn, must be considered in perspective of the issue presented in *Piper Aircraft*, which was whether a dismissal on grounds of *forum non conveniens* is permissible where the private and public interest factors militate strongly in favor of dismissal but where "the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery." *Piper Aircraft*, 454 U.S. at 250. And, the observation must be considered against the Court's explanation that the public interest factor analysis prescribed by *Gilbert* "points toward dismissal when the [federal district] court would be required to 'untangle problems in conflicts of laws, and in law foreign to itself.' " *Id.* at 251 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (19047). Viewed in this context, the *forum non conveniens* analysis to be made in this action simply does not require untangling foreign law; it is unnecessary to assess the adequacy of English law to in order to decide the motion presented by Lloyd's because, unlike *Piper Aircraft*,

the public and private factors all militate against dismissal.[14]

Thus, based on the *Piper Aircraft* balancing test of the public and private factors, Lloyd's motion to dismiss for *forum non conveniens* must be denied.

III. INTERNATIONAL CHOICE OF LAW RULES

Lloyd's argues that, even absent the choice of law and forum choice provisions, English law should still apply because a conflict of law exists and England is the forum that has the most significant relationship to this dispute. The British Government, appearing *amicus curiae*, concurs with this argument which is based both on principles of international comity and on §§ 6 and 188 of the Restatement (Second) of Conflicts of Laws (19791), which mandate that *where a conflict of law exists*, the proper forum is the one with the most significant relationship to the dispute, both in terms of contacts with the subject matter and in terms of the nature of the dispute. (*See also*, Affidavit of Hans Smit).

Whatever may be said for the application of those principles generally, they do not apply here because in this action there is a "substantial question" as to "whether 'there is in fact a true conflict between domestic and foreign law.' " *Hartford Fire Insurance Co. v. California Merret Underwriting Agency Management Ltd.*, 509 U.S. 764, 798-99 (1993) (*quoting Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)). For that reason, the Supreme Court has rejected similar arguments recently raised by

[14]However, if it were necessary to engage in the analysis, it would be essentially the same as the explanation made previously in the public policy analysis under *The Bremen* doctrine. And, for the same reasons, it could not be said that Lloyd's has met its burden on that issue in the context of a forum non conveniens analysis.

Lloyd's in *Hartford Fire*, 509 U.S. 764 (1993), wherein Lloyd's sought to insulate itself from antitrust claims brought by private plaintiffs under the Sherman Act by arguing principles of comity and conflict of laws. The Supreme Court stated:

> The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. They assert that Parliament has established a compreheive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. *But this is not to state a conflict.* The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct. *No conflict exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both. Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law.*

Id. 509 U.S. 798-99 (citations and quotation marks omitted) (emphasis added).

In this case, as in *Hartford Fire*, no conflict exists between the law of the United States and the law of England. Lloyd's is perfectly capable of acting in compliance with both English law and the United States securities laws; and, of course, Lloyd's does not argue that English law requires it to act in a manner inconsistent with United States law. Hence, this case

presents no conflict of law issue, and the court has no need to "address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.

MOTION FOR PRELIMINARY INJUNCTION

The grant of interim injunctive relief is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir.1992) (citation omitted). In this circuit, the decision whether to exercise this power is controlled by the hardship balancing test which involves the application of four factors:

(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,

(2) the likelihood of harm to the defendant if the requested relief is granted,

(3) the likelihood that the plaintiff will succeed on the merits, and

(4) the public interest.

Id. at 812 (citations omitted). It is the plaintiff's responsibility to establish that each of the four factors warrants the exercise of the extraordinary power of injunction. First, the plaintiff must make a "clear showing of irreparable harm as a condition for the grant of a preliminary injunction," and, the irreparable harm "must be 'neither remote nor speculative, but actual and imminent.' " *Id.* (citations omitted). Unless the plaintiff proves irreparable injury, the analysis never proceeds further.

Under the balancing of hardships tests, the second step is to consider the likelihood of harm to the defendant from the grant of injunctive relief and then to balance the likelihood of irreparable harm to the plaintiff from failing to grant such relief against the likelihood of harm to the defendant if it is granted. *Id.* The third step involves the consideration of success on the merits. In that regard:

> If, after balancing those two factors [*i.e.*, irreparable harm to plaintiff against the harm to the defendant], the balance 'tips decidedly' in favor of the plaintiff, a preliminary injunction will be granted if 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.' As the balance tips away from the plaintiff, a stronger showing on the merits is required.

(*Id.* at 812-13 (citations omitted)). In other words, if the balance of harm strongly favors the plaintiff, it is not required that the plaintiff make a strong showing of likelihood of success on the merits. This is because the hardship balancing test is a "sliding scale" approach and "the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." *Id.* at 813 (citations omitted).

Therefore, the party seeking an injunction can meet its burden by showing a combination of *probable* success and the *possibility* or irreparable injury or by showing that serious legal questions are raised on the merits and that the balance of hardships is decidedly in his favor. However, the judge ought to require " 'a fairly clear cut probability of success if he did not find that the harm to the plaintiff outweighed harm to the defendant *to a significant degree.*' " *Id.* (citations omitted).

Before undertaking an analysis of the nature, seriousness and immediacy of the harm to the Names, it is appropriate to recount that "[w]here the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable." *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir.1994). "Even if a loss can be compensated by money damages at judgment, however, extraordinary circumstances may give rise to the irreparable harm required for a preliminary injunction." *Id.* For example, if the moving party's business could not survive absent a preliminary injunction or if damage would not be obtainable because the defendant may become insolvent before final judgment can be entered, the requirement of irreparable injury may be satisfied. Of course, "[t]hese situations are quite narrow, reflecting instances where the harm suffered by the plaintiff from denying the injunction is especially high in comparison to the harm suffered by the defendant from granting it." *Id.*

I. THE HARM TO THE NAMES ABSENT AN INJUNCTION

The Names assert irreparable injury in the form of the choice to which Lloyd's has put them: *accept* the settlement offer and give up all of your claims no matter who they may be against nor how valid they may be, including claims that the documents which induced them to enter the R&R were fraudulent;[15] *or*

[15]Clause 2.2 of the Settlement Offer, (R&R Plan, Appendix 1, p. 19) provides that the Disclosure limitations on it do "not exclude liability for fraudulent misrepresentations," and Lloyd's stipulated that the cited language would apply in subclauses (a) through (d). However, the entire R&R document contains so many other disclaimers that reliance on anything in the documents could be asserted to be unreasonable. The recent stipulation in the affidavit filed after the evidentiary hearing by Lloyd's CEO, Mr. Sandler, attempts to solve this problem, but it does not.

reject the settlement offer and the benefits it provides and face the prospect of protracted litigation and additional financial loss, perhaps even financial ruin. Thus, to the Names, proceeding with the decision to accept or reject the R&R proposal would work an irreparable injury because they would be required to make a vital investment decision based on incomplete and potentially materially misleading information. They argue, with convincing force, that once they are put to that election, no court anywhere can undo the consequences. The loss of the option to accept the R&R is to the Names just as irreparable as the rejection of it.

In perspective of the harsh terms and the clear cut description of the affect of nonacceptance which is contained in the R&R plan, Lloyd's is hard pressed to refute the irreparable nature of the election which it is forcing the Names to make. In fact, Lloyd's argument respecting the nature of the injury to the Names is based on a fundamental mischaracterization of the claim of injury advanced by the Names. Specifically, Lloyd's asserts that "[p]laintiffs' only claim of 'injury' is that the cost of obtaining reinsurance through Equitas may be too high and the total amount of settlement funds and debt credit being offered in consideration for release of litigation claims may be too low. Such injury, if proven, is compensable in money damages." (Lloyd's Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 34). That simply is not the argument made by the Names.

Perhaps in recognition of the irreparable consequences of the choice it has put to the Names, Lloyd's only effort to address the Names' contention of harm by virtue of that election is to suggest that, somehow, the violation of the disclosure and solicitation rules may be addressed by an award of monetary damages in subsequent legal proceedings. That is disingenuous in perspective of Lloyd's own clear explanation

in the settlement offer of the consequences of failing to accept the R&R plan. Contrary to the arguments Lloyd's now makes, the consequences, as Lloyd's has itself described them, are stark and they are final.

In particular, the Names are being asked to forego claims against Lloyd's insiders, its officers and directors, its lawyers, its accountants, the Managing Agents it controls, the Members' Agents it controls, and indeed against anyone in the Lloyd's enterprise who was involved in what is one of the most far reaching and serious insurance frauds of record anywhere.

That the rights which Lloyd's insists the Names must surrender are valuable is proved beyond serious question by the sheer volume of claims successfully asserted against those involved in this fraud and the fact that, to date, there have been judgments and awards in the English courts and in arbitration of more than £1 billion.[16] These judgments and awards have not been paid to the Names because Lloyd's has pressed, with some success, the argument that any recoveries must be applied to the Name's obligations to the policyholders. And, because the judgments and awards are the subject of the settlement offer segment of the R&R, the names cannot even have access to the fruits of the successful litigation efforts without accepting the settlement offer and the R&R.

Lloyd's also insists that the Names relinquish the right to use any aspect of the fraud to defend against the efforts of Lloyd's to levy on or secure judgment against the Names' interest in the Lloyd's Deposit or the Central Fraud or Lloyd's efforts to have recourse to the Names' net worth.

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[16]That is further demonstrated by the size of the settlement contributions to be put into the settlement fund and by the enormity of the debt credit package.

There are, no doubt, sound arguments to be made in support of, and in opposition to, the various benefits and detriments created by the settlement offer and the R&R. But, what is not open to debate is that the claims and defenses which the Names are being forced to surrender in order to accept Lloyd's offers are extremely valuable rights. And, it is equally beyond debate that those rights, once surrendered, are forever lost.

Rejection of the settlement offer and the R&R also evokes extremely harmful and irrevocable consequences. For example, rejection exposes all of the Names' funds at Lloyd's to immediate risk. And, Lloyd's has promised rejecting Names that they will face immediate and pervasive litigation from Lloyd's in efforts to secure recourse to the Names' other assets up to, of course, their net worth in some cases. And, the Names will be conscripted into Equitas and be liable to contribute to its capital. Once that course is selected, there is no retreat from it and its consequences.

When those facts are considered in perspective of the admitted additional risks of continuing liability to which the Names will be exposed (even if they accept the package) in the event that Equitas does not perform in the fashion predicted by Lloyd's, the magnitude of the choice is evident. More to the point for the instant analysis, there is no possibility that the election to accept or reject once made may be revisited. It, therefore, is in a very real sense irreparable.

The harm is beyond cavil immediate. Lloyd's announced the final version of its proposal in late July and demanded an answer by late August. And even the package it announced then is not, by its own terms, finalized in important respects because the contributions to the settlement funds are still contingent and may, in Lloyd's words, never be realized. Nonetheless, and notwithstanding that Lloyd's itself has until **February 28, 1997**

to decide whether there have been enough acceptances or whether other conditions to effectiveness of the Settlement Offer and R&R have been satisfied, Lloyd's insists that the Names accept or reject by **August 28, 1996**.

This date, says Lloyd's, was selected so that Lloyd's could meet the solvency tests set by DTI and insurance regulators in the United States. However, Lloyd's has known since early 1995 that the solvency test might be difficult of satisfaction by August 1996. Armed with that knowledge, Lloyd's failed to ask even for brief extensions of time after it belatedly came to the point of putting forward even the incomplete plan issued in late July. Instead, Lloyd's placed the onus of its own delay on the Names by affording them less than a month to consider the stark and dire choice and the consequent irrevocable election.

Lloyd's seeks to avoid the consequences of this conduct by arguing that it has been feeding information to the Names — indeed in great volume — for months. That is true, but it does not help Lloyd's.

The record discloses clearly that each time the Names have received information about the progress of R&R, it has differed in significant ways from previous installments of like information. And, the critical Settlement Agreement itself was not released, even in draft form, until the end of July 1996. As Lloyd's explains, the documents changed because the deal was changing. And, Lloyd's is to be commended for its efforts to communicate with the Names. However, the facts remain that: (1) the Names only recently received the Settlement Offer and R&R; (2) those documents are complex and confusing; (3) they differ from their predecessors in significant ways; (4) they are filled with many words and little data; (5) they are laced with disclaimers that counsel against

reliance; (6) they define an exceedingly complex corporate reorganization which will drastically alter the Names' current relationship in and with Lloyd's; and (7) they are not accompanied by the basic information necessary to evaluate the decision demanded by their terms.

As explained, one key document for a Name is the Finality Statement. It posits generally the liabilities owed by the Name; the credits to be given the Name and the amount of the Equitas premium to be paid by the Name. Although so-called indicative Finality Statements were sent twice over the past two months, the final Finality Statement was not mailed until early August. And, according to the record, even the final version contains previous little explanation and often differs from the "indicative" predecessors. The supporting documents attached to the Finality Statements do not remedy the problem because a Name cannot tell how his liability was calculated or whether it is long-term or short-term. Nor is it possible to verify the credit or premium calculations.

This, of course, is in glaring contrast to what Lloyd's had been suggesting since April 2, 1996. Specifically, Lloyd's takes great comfort in the report of the highly reputable lawyers (Slaughter & May) who represented the so-called Validation Steerling Group, a group of Names who examined, at Lloyd's expense, some of the information on which the R&R and the settlement offer apparently was based. Lloyd's touted the Slaughter & May report to the Names as evidence of the reasonableness of R&R and the settlement offer. And, the Names reasonably could have interpreted the report in that fashion. However, Lloyd's ignores the fact that when the R&R and the settlement offer was unveiled in July, they were not accompanied by the critical information which had been specifically recommended by Slaughter & May. Specifically, the firm's report said:

> Names should have some comfort that Equitas will be financially viable over and above that provided by DTI authorization. When the document containing the detailed proposals for R&R is published to Names, it should contain reports from the professionals advising Lloyd's similar to those which would normally be contained in a prospectus. Names should be able to derive a level of comfort about the information on Equitas contained in the document similar to what would be available to members of the public being invited to subscribe for shares in it (paragraph 52(c)).

Slaughter & May Report, Pl. Ex. 10 (Summary, p. 4, ¶ 3). The text explained in detail that:

> Lloyd's will be receiving a considerable amount of expert, professional advice in constructing Equitas' opening balance sheet. When the final details of R&R are unveiled to Names, they will reflect this advice. The document in which these proposals are contained will be similar to a prospectus issued in relation to a company in which members of the public are invited to invest, to which the Financial Services Act 1986 would apply. Although the document will not technically constitute a prospectus of this nature, the analogy is entirely appropriate. It is Names' money which will be paid into Equitas, its share capital will be held for the benefit of Names, and Names will be the only persons, or at least the principal persons, likely to be damaged by its failure or to receive whatever profits it makes. Accordingly, in our view, when the document containing the detailed proposals for R & R is published to Names, it should contain reports from the professionals advis-

> ing Lloyd's similar to those which would normally be contained in a prospectus. Names should be able to derive a level of comfort about the information on Equitas contained in the document similar to what would be available to members of the public being invited to subscribe for shares in it.

(Slaughter & May Report, Pl. Ex.10, p. 19, ¶ (52(c)).

It was reasonable of the Names to expect precisely what Slaughter & May said was to be forthcoming. Lloyd's furthered that expectation by itself relying so heavily on the Slaughter & May report to promote R&R as reasonable. Unfortunately, and undisputedly, Lloyd's never provided that key information.

And, the absence of it has contributed materially to the immediacy of the irreparable injury faced by the Names.

Lloyd's asserts that the plaintiffs have no irreparable injury because, in May (Def.Exhs. 1 and 2) the plaintiffs' counsel advised that litigation against Lloyd's would provide an impetus for Lloyd's to improve the terms of the settlement. Those letters, though perhaps ill-advised, do nothing more than reflect the realities of litigation and the consequences of the successful exercise of legal rights. They do not disprove irreparable injury. Rather, they reflect an effort to counter it. Let there be no doubt that at the core of this action there lies financial interest: Lloyd's and the plaintiffs'. That is not unusual when investments are involved. Nor does Lloyd's suggest that the letters raise an equitable defense to injunction.

Under all the circumstances, the court has no hesitation in concluding that the Names have satisfied the requirement of *Direx Israel* that there be a clear showing of an actual,

imminent irreparable injury.[17]

II. THE HARM TO THE DEFENDANT IF AN INJUNCTION IS GRANTED

Lloyd's contends that failure to implement the R&R on its current schedule will mean that many Names will be unable to satisfy the DTI's individual solvency test and that the Lloyd's market will be unable to satisfy the global solvency test, with the result being that the Lloyd's market would be forced into run-off with the consequences described in detail in Chapter 12 of the R&R. According to the R&R, the so-called "run-off alternative" would mean that, at some point in the future, the Society of Lloyd's might, "cease to trade insurance and would go into run-off." R&R Settlement Offer, July 1996, p. 135. The consequences of such an action are summarized in Chapter 12 of the R&R. They are:

- Except as provided otherwise under the direction of the DTI, Lloyd's and the Council of Lloyd's would be required to place the interest of creditors of the Society of Lloyd's and policyholders over the Council's obligations to members
- The Society could be forced to seek a provisional liquidator

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[17]It is rather surprising that Lloyd's would argue that there is some basis to convert the plaintiffs' claim into dollar damages which can be easily retrieved. This assertion is particularly startling given the fact that the R&R document deprives the Names of any possible claim in connection with a misrepresentation associated with the documents by which the Lloyd's plan has been put forward. The reality of that election is perhaps even more graphically demonstrated by the fact that Lloyd's announced its intention to fight its obligations to the pay the judgments already awarded against it as to any nonaccepting Name. It is, therefore, incredible to hear Lloyd's assert that the consequences of the election to which they have put the Names somehow may be converted to recoverable money damages. That simply is not so and the Court rejects it absolutely.

- Managing agents would be obliged to enforce the "pay now, sue later" provisions thereby requiring the payment for all losses immediately
- The Council would not be able to impose the members' special fund contribution on the contributions of the managing agents and members' agents
- The Society's assets would have to be preserved for the benefit of the Society's own creditors and could not be used for the benefits of the members
- The Central Fund could not be used to make good the Names' shortfalls
- Managing agents would not be able to rely on the Central Fund to make good any shortfall
- Lloyd's would fail therefore to pass its solvency test
- The DTI's power of intervention would become excercisable and the DTI would have to act
- Overseas regulators, particularly those in the United States, would be likely to exercise their powers of intervention which might include seizure of trust assets and regulatory deposits held in their territory

(R&R, Settlement Offer, July 1996, pp. 135-36).

Additionally, in the view of Lloyd's, further commercial consequences would ensue a failure to pass the insolvency tests. These would include: (i) a spiral of defaulting reinsurance recoveries across the Lloyd's market; (ii) the absence of ongoing relationships between Lloyd's and the outward reinsurers

which would reduce cashflows resulting in additional cash calls on the members and would necessitate that premiums held by brokers be withheld in order to protect their client's interests; and (iii) the increase of administrative and agency expenses would increase.

In sum, "the Council believes that a Lloyd's run-off would inflict severe damage and uncertainty on all categories of members. Syndicates would not be able to close and members would be trapped until all their liabilities have been met (which, in the case of long-tail business, could be decades). Consequently, in most cases it would be unlikely that a member's executor would be able to wind up his estate until all the member's Lloyd's liabilities had been met." *Id.* at 137. The Council also has expressed the view that even profitable and well managed syndicates would be disadvantaged by the run-off alternative because their assets and profits would be retained in the Lloyd's security net until all liabilities of all members of the other syndicates have been provided for.

Further, according to Mr. Duguid, a delay caused by an injunction, even a temporary one, might prove permanent because it would be impossible as a practical matter to renew the settlement offer. The reasoning for this assertion is unclear, but seems to be based upon the premise that the settlement fund contributions from Lloyd's and others are being contributed on the assumption that the market will continue and that such contribution will not be forthcoming in a run-off. (Duguid Aff. 2, Exh. N, § 2, ¶ 7).

Also, according to Lloyd's CEO, Mr. Sandler, because the R&R provides for an ongoing ability of the Lloyd's market to function in the future, an injunction which would delay the R&R would operate, in turn, to foreclose Lloyd's from access to the market for new business. This is because the months ensuing August are the renewal season in the insurance industry

and a delay in the implementation of the R&R proposal would jeopardize the ability of Lloyd's underwriters to participate in either the direct or reinsurance markets. (Duguid Aff. 2, ¶¶ 40-41).

Lloyd's also asserts that, absent Equitas, the Names would have no means of obtaining reinsurance to close and thus they would have no meaningful prospect of finality; Names would remain obligated to pay the claims of insureds in respect of the pre-1993 underwriting liabilities for some decades to come. This contention, of course, is premised on the assumption that a preliminary injunction would eliminate the possibility of proceeding with Equitas at all.

The next point made by Lloyd's is that, if the market were forced into run-off, the 34,000 Names, approximately 90% of whom live outside the United States, will be in a worse position than the one in which they currently stand. This is the view of both the counsel of Lloyd's and the DTI. (Duguid Aff. 2, ¶ 29, Exh. B).

The plaintiffs evidence in response to these contentions is found in large part in the Declaration of Robert L. Westin, President and Co-Owner of Victus, Inc. Westin, who is an expert in the insurance industry with considerable experience involving Lloyd's, has analyzed Lloyd's resources as well as the proposal for the R&R. He expresses the opinion that the formation of Equitas would not be impeded if there was an initial shortfall in the collection of all or part of the contribution expected from American Names as part of the R&R or if the drawdown of their accounts in the Central Fund was foreclosed. (Westin Declaration, ¶ 21, p. 13). He also is of the opinion that Lloyd's ability to meet ongoing cash claims settlement obligations for the benefit of its policyholders could be satisfied out of its own net resources. (*Id.*, ¶ 22). In sum, Westin believes that a survival of the Lloyd's market simply

does not depend upon the millions it seeks to collect from American Names.[18]

With respect to the August deadline, the former Chief Executive Officer of Lloyd's, Ian Hay Davison, has stated that there is no statutory deadline for the solvency test in the Lloyd's acts and that the DTI is quite understanding when difficulties arise. He also explained that the annual August deadline is imposed by virtue of the fact that the New York Insurance Commissioner requires by September 1 certificates to the affect that Lloyd's has complied with current UK requirements as to solvency. Although the failure to meet that deadline would mean suspension of Lloyd's in New York (which Davison describes as devastating for Lloyd's business), Lloyd's had not inquired about a delay as of the date of the preliminary injunction hearing. However, Hay is of the opinion that the problem could be avoided if the solvency test were recast. (Second Hudson Aff., Exh. F., p. 179).

Lloyd's own documents provide some additional information about the nature of the injury which would be worked on Lloyd's in the event of a preliminary injunction.

First, as explained previously, the R&R plan specifically declares that the settlement terms are not yet completed and that there is a risk that the funding commitments on which the settlement fund is based may not become legally binding. In that event, the reconstruction plan would fail. This eventuality, of course, has little to do with the issuance of a

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[18] According to Lloyd's, Westin knows nothing and is not worthy of belief. (James Schactt, Aff. II). Westin's resume and the substance of his report reflect that he cannot be so easily dismissed.

preliminary injunction, but it suggests that some delay is actually expected by those in charge of the R&R.

Second, the R&R makes clear that it would not go into effect unless a sufficient number of Names accept its terms. The R&R documents do not disclose what is meant by a "sufficient number," but clearly the R&R plan already is subject to delay in the event that a "sufficient number" of Names do not accept its terms.[19] Third, the R&R document shows that the contributions from Managing and Members' Agents, totaling £225 million, are "still to be completed and it is possible that the amount to be received in 1996 would fall short of £225 million." (R&R, Settlement Offer, July 1996, p. 32). Apparently, negotiations even now are under way respecting the deferral of some of those payments.

Fourth, the British government, specifically the DTI, must approve all future arrangements before Equitas can function and the market can continue. That clearly is expected to take time.

Fifth, in a settlement agreement with state securities administrators Lloyd's agreed not to commence certain financial levy proceedings against certain Names under certain circumstances until October 31, 1996.

All of these uncertainties and the indefinite circumstances which they necessarily will engender will continue into the renewal season, whether preliminary injunction is granted or not. And, they will continue beyond August 28.

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[19]Lloyd's CEO, Mr. Sandler, testified that "sufficient number of acceptances" was in reality a subjective determination of the volume of claims that would be released by Names, the amount of capital to be provided from the accepting Names and the number of syndicates which could close.

Sixth, under the Settlement Agreement, Clause 2.2, the conditions to the effectiveness of the Settlement Agreement do not have to be met until **February 28, 1997** and, by virtue of Clause 2.1, the Council of Lloyd's, under Clause 2.2, has until that then to determine that sufficient acceptances have been forthcoming.

The testimony of Mr. Sandler at the preliminary injunction hearing and the other evidence submitted by Lloyd's from state insurance regulators and the DTI convincingly establish that an injunction which brought the acceptance process to a complete halt presents a serious risk that the R&R plan could not succeed. However, the record is different as to an injunction of lesser scope.

In that regard, if all American Names accept R&R, they will contribute £150 million to Equitas. If they reject R&R, their contribution would be £500 million. However, there is a £1.7 billion cushion built into the long term structure of Equitas so it is not cash poor in the near term. Moreover, there is available a loan facility which could provide approximately £120 million immediately to cover any shortfall of contributions by American Names.

Although Mr. Sandler testified that exempting all American Names (of which there are slightly less than 3000) from the August 28 deadline could cause the same results as an injunction against proceeding with the R&R in its entirety, Lloyd's offered no other support for that view. More to the point, that subjective assessment of matters is inconsistent with objective evidence of the availability of short term financial alternatives. And, it fails to account for delays already contemplated by, and built into, the R&R plan, especially the time cushion built into the R&R by Clause 2.2 of the Settlement Agreement.

Nor do the subjective predictions of the adverse effect of a limited injunction take into account the fact that the DTI and the state insurance regulators have the power to extend the dates for satisfaction of the solvency tests. If, as those entities claim, the success of R&R is important to them, a slight adjustment in the schedule for solvency assessment would seem to be in their interest. More to the point, though, is that DTI and the state insurance regulators, according to the filings made in this action, are fully familiar with R&R and that would include, of course, all of the terms which tolerate, portend and sanction some delays in the schedule for R&R. And, considering that those regulators have that knowledge, the fact that none of them have said that solvency test schedule is cast in stone is a significant factor.

In perspective of all the foregoing, it cannot be said that the consequences to Lloyd's of a brief delay pending disclosure of the limited information sought by the plaintiffs will be nearly as harmful to Lloyd's as the failure to issue an injunction and require disclosure would be to the Names.

III. LIKELIHOOD OF SUCCESS

Taken as a whole, the balance of hardships tips in a significant way toward the plaintiffs because what they have at stake is the choice of forfeiting of extremely valuable rights and agreeing to a fundamental, permanent change in the relationship with Lloyd's without adequate information to assess the effect of such an agreement or rejecting the R&R and placing their entire investment in Lloyd's and their entire net worth at the almost risk of immediate and unremitting levy by, or litigation with, an adversary with enormous assets. A limited injunction, however, will not preclude Lloyd's from going forward with R&R which, by its terms, need not be completed until February 27, 1997. On this record, the harm to the

Names far outweighs that confronting Lloyd's. That is particularly true because the further proceedings in this court will be on an expedited schedule which will bring the action to an end well before February 27, 1997.

Hence, the Names now must show that, as to their securities laws claims, they have " 'raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and then far more deliberate investigation.' " *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 813 (4th Cir.1991). As explained below, the Names have more than satisfied that requirement. Even if the court has erred in concluding that the balance of hardship tips decidedly in the Names' favor, there is little question that their probability of success on the merits is reasonably likely and hence, on the "sliding scale" applicable in this circuit, the Names have satisfied their duty.

A. It is Reasonably Likely That Names' Investments In Lloyd's and Participation in Equitas Are Securities

The Names allege that their investments in Lloyd's are "investment contracts," and thus "securities," within the meaning of § 2(1) of the 1933 Act and § 3(a)(10) of the 1934 Act.[20] The Names also allege that Lloyd's is offering to sell them "investment contracts," and thus "securities" in Equitas.

Lloyd's contends, however, that Names' are insurers and do not invest in Lloyd's or its syndicates. Lloyd's also argues that Names would purchase reinsurance, not a security, from

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[20]15 U.S.C. § 77b(1); 15 U.S.C. § 78c(a)(10). Both define security to include "investment contracts." *Id.*

Equitas. Consequently, Lloyd's has asserted that both of these transactions fall within the purview of the insurance exemption to the securities laws, § 3(a)(8) of the 1933 Act, 15 U.S.C. § 77c(a)(8). Moreover, even if the insurance exemption does not apply, Lloyd's urges that neither of these transactions constitute "investment contracts," and thus are not securities.

For the reasons discussed below, the court finds that plaintiffs have a reasonable likelihood of success in proving that: (1) Names' participation in Lloyd's and its syndicates, as well as the Equitas transaction, do not fall within the insurance exemption to the federal securities acts; and (2) the same constitute "investment contracts" and are thus "securities."

This court's conclusions find support from numerous securities administrators. First, an *amicus curiae* sent by the North American Securities Administrators Association, Inc. to the Ninth Circuit stated quite unequivocally that "Lloyd's of London has offered and sold securities to investors in the United States." (Hudson Aff. II, Exh. B). Second, numerous state securities commissioners have brought proceedings against Lloyd's, generally "alleg[ing] that certain aspects of Names' participation in the Lloyd's market constitute securities ..." Other "state securities commissioners have suggested that the settlement offer itself and the Equitas RITC may constitute a security ..." (R&R Settlement Offer, July 1996, p. 128). And several states have issued administrative orders, which among other things purport "to prohibit draw downs under letters of credit or other funds at Lloyd's of Names resident in the particular states and 'offers or sales of securities' by Lloyd's in those states." (R&R Settlement Offer, July 1996, pp. 127-128). Finally, letters from the SEC to Congressmen and Senators, have indicated that the SEC staff long ago concluded, and so informed Lloyd's, that the solicitation of participation in Lloyd's involved the sale of a security. (See

e.g. letter to Senator Campbell, Hudson Aff. I, Exh. O).[21] These letters are entitled to no deference, but, taken together, with the rest of the evidence on the issue, they are entitled to be given evidentiary force.

1. It is Reasonably Likely that Neither Names' Investment in Lloyd's Nor Names' Participation in Equitas Fall Within the Insurance Exemption

a. Statute

To determine whether the transactions at issue fall within the insurance exemption to the federal securities laws, the court turns first to the language of the statute. Section 3(a)(8) of the Securities Act of 1933 provides that "[e]xcept as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities . . . . Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia." (15 U.S.C.A. § 77c(a)(8)).

Defendants argue that the Names' sale of insurance coverage to policyholders does not constitute the purchase by the Name of a security. Plaintiffs contend that on its face, the exemption applies only to insurance policies and not to investments. They further argue that Names have invested

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[21]In that letter, the SEC stated that "In 1977, and in 1987 and 1988, counsel for Lloyd's met with the staff of the Commission's Division of Corporation Finance to discuss the applicability of the U.S. securities laws to the solicitation of U.S. Names ... the Staff concluded in 1988, in response to inquiries from Lloyd's counsel, that the solicitation of an individual to become a Name involves the offer of a security within the meaning of the federal securities laws." (Hudson Aff. I, Exh. O).

in the capital of an insurance company. They have not purchased insurance policies, and the exemption does not apply.

There is no doubt, as defendants' allege, that "the activities of the Names in the Lloyd's market bear ... [the] hallmarks of insurance." Yet, it is also evident that Names, as will be further discussed, are passive investors, who do not actively participate in the insurance underwriting process beyond pledging unlimited liability to pay claims. As a consequence, Names participation in Lloyd's is hybrid, bearing resemblance to insurance in some instances and to a security in others. In the words of two eminent jurists:

> Much bewilderment could be engendered by this case if the issue were whether the contracts in question were "really" insurance or "really" securities — one of the other. It is rather meaningless to view the problem as one of pigeonholing these contracts in one category or the other. Obviously they have elements of conventional insurance ... But the point is that ... administering [these contracts] also involves a very substantial and in fact predominant element of the business of an investment company, and that in a way totally foreign to the business of a traditional life insurance and annuity company, as traditionally regulated by state law.

Securities and Exchange Commission v. Variable Annuity Life Insurance Company of America, 359 U.S. 65, 80-81 (1959) (Brennan, J. and Stewart, J. concurring).

Thus, the task of this court, as explicated by these jurists, is to examine why Congress created the insurance exemption to the securities laws. The inquiry must focus first on "the functional distinction that Congress set up ... to test whether the contract falls within the sort of investment form that Con-

gress was then willing to leave exclusively to State Insurance Commissioners." Accomplishing this task requires an examination of the protective purposes behind the securities and insurance regulation. 359 U.S. at 76.

b. Legislative Purposes

The federal securities laws, as remedial legislation, should be "construed broadly to effectuate its purposes."[22] The central purpose of these laws is to "compel [ ] full and fair disclosure relative to the issuance of the 'many types of instruments that in our commercial world fall within the ordinary concept of a security' . . . . It [the test for determining an investment contract] embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[23] "In searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality."[24] On the other hand, the purpose of life insurance and annuities is to ensure that "solvency and the adequacy of reserves to meet the company's obligations are supervised by the establishment of permissible categories of investments and through official examination."[25]

Although the policyholders, or insureds, in the Lloyd's market are protected by the solvency requirements of the insurance laws of the States and England, the court has not been

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[22]*Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

[23]*SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

[24]*United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848 (1975) (quoting *Tcherepnin*, 389 U.S. at 336).

[25]*Variable Annuity Life Insurance Co. of America*, 359 U.S. at 77 (Brennan, J. and Stewart, J. concurring).

asked to examine this relationship. At issue in this case is the relationship between Names and Lloyd's. And, this relationship is one that does not "square with the sort of contract in regard to which Congress in 1933 thought its 'disclosure' statute was unnecessary."[26] Rather, this court finds that plaintiffs have a reasonable likelihood of success in proving that Names are passive investors in Lloyd's. Consequently, exempting Names from the securities laws would decidedly frustrate the purpose of those laws, namely to ensure that investors have the information they need when they entrust their money to the control of others.

c. Names are Passive Investors

To say that Names are "insurers" rather than "investors" ignores the economic reality of the Lloyd's Market.[27] The evidence overwhelmingly supports plaintiffs' view that Names are passive investors.

> The persons who carry on the business at Lloyd's are, respectively, the brokers, active underwriters, member's agents, managing agents, and Names (who make up the syndicates). The Names are the individual investors. They pay fees and delegate complete authority to conduct Lloyd's affairs to "member's agents." Although Names are the ultimate underwriters of the insurance, they do not participate actively in the underwriting process or in the recruiting of other Names to the syndicates. They have no management authority and cannot bind their fellow members or the syndicate * * * Managing Agents run the syndicates. * * * An employee

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[26] *Id.* at 78.

[27] *See generally, United Housing Foundation, Inc. v. Forman*, 421 U.S. at 848 (quoting *Tcherepnin v. Knight*, 389 U.S. at 336).

> of the managing agent, known as the "active underwriter" acts on behalf of the Names in a syndicate in the "buying" and "selling" of insurance risks ... The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will assume."[28]

Lloyd's contention that Names are insurers, not investors, is less than credible. The proof is in the pudding, as they say. Section 7.3 of Lloyd's Agency Agreements Byelaw provides that, "The Name acknowledges that he has delegated to the Agent sole management and control of the underwriting and that the Agent is not bound to comply with instructions or requests of the Name relating to the conduct of the Underwriting and undertakes that he will not in any way interfere with the exercise of such management or control." (Duguid Aff. I, Exh. I at 170). A Lloyd's of London *Annual Report and Accounts 1993* specifically refers to Names as "[o]ur investors." (Hudson Aff. II, Exh. E).[29] Moreover, according to the former Chief Executive Officer of Lloyd's,

> Originally Names at Lloyd's were all workers in the market themselves, but since 1945, with the rapid growth of the membership of Lloyd's an increasing proportion are outsiders. At the latest count 82 percent of the Names were external members who were, in fact, nothing other than passive investors in the syndicates in which they participated.

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[28] *Roby v. Corporation of Lloyd's*, 796 F. Supp 103, 104-5 (S.D.N.Y. 1992) (citing for support, *Syndicate 420 at Lloyd's London v. Early American Insurance Co. Ltd.*, 796 F.2d 821, 824 (5th Cir. 1986)).

[29] "Our investors, the Names, are vital to this Society." Statement by Peter Middleton, Chief Executive Officer, *Lloyd's of London Annual Report and Accounts 1993*.

(Hudson Aff. II, Exh. F, A View of the Room Lloyd's Change and Disclosure, Ian Hay Davison).

For all of these reasons, the contention that Names' are insurers, (Atchinson Decl. ¶ 7; Muhl Decl. ¶ 7), ignores the economic reality that Names are also, and predominantly, passive investors. The simple fact that Names' money is used by Managing Agents to underwrite insurance rather than by an industrial plant to build widgets should not, by itself, exempt those who profit by the use of such assets from the application of the securities laws.[30] The purpose of the securities acts, namely to protect passive investors by ensuring that they are given adequate information from the company using their money, would be frustrated by exempting the transactions at issue in this case. Consequently, this court holds that plaintiffs have demonstrated a reasonable likelihood of success in proving that Names' relationship with Lloyd's as passive investors, both with regard to their initial investment and the proposed use of the Names' invested assets in Equitas, would not fall within the insurance exemption of the 1933 Act. This is true even if, contrary to what this court holds, the Equitas transaction does not constitute the purchase of a new security.[31]

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[30]*See SEC v. Howey*, 328 U.S. 293, 299 (1946) (The definition of investment contract "permits the fulfillment of the statutory purposes of compelling full and fair disclosure ... It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.")

[31]Because of this holding, it is unnecessary to decide whether because the 1934 Act does not contain a specific insurance exemption, it implicitly exempts insurance policies from its parameters. *See*, L. Loss & J. Seligman, *Securities Regulation* 1001 (3 ed. 1989) (describing the insurance exemption in § 3(a)(8) of the Securities Act as "supererogation"). It is also unnecessary to decide whether Equitas is regulated by one of the United States and would thus fall within the exemption. On the other hand,

(footnote continued)

2. Defining Investment Contracts, The *Howey* Test

As noted previously, plaintiffs claim that the transaction at issue in this case constitute investment contracts and are thus securities. Section 2(1) of the 1933 Act and section 3(a)(10) of the 1934 Act define security to include "investment contracts."[32] Although the Acts do not define what constitutes an "investment contract," in *Securities Exchange Commission v. W.J. Howey Co.*,[33] the Supreme Court adopted a three prong test: "[A]n investment contract for the purposes of the

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characterizing Equitas as a security that exists separate and apart from Names' relationship with Lloyd's presents a closer question regarding the insurance exemption. If one perceives the Equitas transaction as involving the purchase of reinsurance, such purchase could arguably fall within the exemption. As the following discusses, however, the court has concluded that plaintiffs have established a reasonable likelihood of success in demonstrating that their assets will be used not simply to purchase reinsurance, but to capitalize a new reinsurance company, Equitas. It follows, then, that a reasonable likelihood of success also exists in proving that the transaction would not fall within the insurance exemption.

[32]Section 2(1) of the Securities Act of 1933 (15 U.S.C. § 77b(1)) provides that a security means "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." The wording of Section 3(a)(10) of the Exchange Act differs slightly from that of section 2(1) of the Securities Act "and are generally accepted to be indistinguishable." *Teague v. Bakker*, 35 F.3d 978, 986 n. 6 (4th Cir.1994) (citing e.g. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 n. 1, (1985)).

[33]328 U.S. at 298-99.

Securities Act means a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.''[34]

In applying this test to the facts of this action, this court was mindful that the federal securities laws, as remedial legislation, should be ''construed broadly to effectuate its purposes ... One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities ...[35] Moreover, ''in searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality.''[36] The court is also mindful that ''Congress, in enacting the securities laws, did not intend to provide a federal remedy for all common law fraud.''[37]

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[34]*Id.*

[35]*Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

[36]*Forman*, 421 U.S. 837 (1975) (quoting *Tcherepnin v. Knight*, 389 U.S. 332 (1967)); *see also e.g., W.J. Howey Co*, 328 U.S. at 298 (1946) (Congress used the term 'investment contract' as it had been crystallized by prior judicial interpretation of state law. ''Form was disregarded for substance and emphasis was placed upon economic reality.''); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979) (The Howey test ''is to be applied in light of 'the substance — the economic realities of the transaction — rather than the names that may have been employed by the parties.''); *Securities Exchange Commission v. Pinckney*, 923 F.Supp. 76 (E.D.N.C.1996) (''one must look to the substance, rather than the form, of the transaction, and 'the emphasis should be on economic reality.' '') (citation omitted).

[37]*Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236 (4th Cir.1988) (citing *Marine Bank v. Weaver*, 455 U.S. 551 (1982)).

3. It is Reasonably Likely that Names' Investments in Lloyd's Constitute Securities

a. Names Have Invested Money In Lloyd's

i. Rule of Law

In *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), the Court provided further meaning to the first prong of the *Howey* test. In order to determine whether an investment occurred, the *Daniel* court noted that "in every decision of this Court recognizing the presence of a 'security' under the Securities Acts, the person found to have been an investor chose to give up specific consideration in return for a separable financial interest with the characteristics of a security." *Id.* at 559-60 (citations omitted).

ii. Analysis

Plaintiffs argue that they have invested in Lloyd's by paying an entrance fee to Lloyd's, depositing a letter of credit with Lloyd's, pledging their entire net worth by accepting unlimited liability, agreeing to pay annual levies for Central Fund contributions, and either agreeing or paying various other fees, cash calls and levies.[38] Lloyd's views these transactions differently, arguing that Names have made no investment.

For example, Lloyd's contends that the administrative fees paid by Names and the Central Fund levies resemble licensing fees or contributions to a state guaranty fund. Lloyd's also alleges that the acceptance of unlimited liability and the posting

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[38]Other examples of "investments" provided by plaintiffs include, agreeing that revenue generated from the conduct of each Syndicate's underwriting business would be held in trust and invested, agreeing to pay an "annual subscription," and promising to meet cash calls.

of a letter of credit demonstrate only that Names' have resources sufficient to cover claims but do not constitute tangible and definable consideration.[39]

Even after crediting Lloyd's assertions that fees do not constitute investments, its arguments do not withstand scrutiny. First, Lloyd's cites no cases for its assertion that Names' depositing a letter of credit and pledging their entire net worth do not constitute "tangible and definable consideration." In contrast, plaintiffs pointed to case law for the position that "[A]n investment of money means only that the investor must commit his assets to the enterprise in such a manner as to subject himself to financial loss.' "[40] Certainly, pledging one's entire net worth and putting up a letter of credit would subject a Name to risk of financial loss.

There is a second reason why this court remains unpersuaded by Lloyd's arguments. It has been stated that the *Daniel* holding, in essence, "balanced the motivation to invest against the motivation to receive employment."[41] Testimonial evidence at trial demonstrated that Names' chose to participate in Lloyd's not from some overwhelming desire to underwrite insurance, but rather to invest their money just as they would invest in stocks and bonds. As discussed above, the economic reality of Names' participation confirms that they serve as passive investors and not active insurance underwriters. Evidence also indicated that Names were solicited to participate in Lloyd's as an "investment decision." For these reasons, plaintiffs have shown a reasonable likelihood of success in showing that they have invested in Lloyd's.

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[39]Finally, Lloyd's alleges that the revenue held in premium trust funds do not constitute investments because they are part of a "chain of security" to ensure that claims are paid.

[40]*S.E.C. v. Pinckney*, 923 F.Supp. 76 (E.D.N.C.1996) (quoting *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.)).

[41]L. Loss, Joel Seligman, *Fundamentals of Security Regulation* at 187.

2. Lloyd's or Its Syndicates Constitute Common Enterprises

a. Rule of Law

In the decision that created the common enterprise test, *Securities and Exchange Commission v. W.J. Howey Co.*, the Court found such an enterprise to exist when:

> individual development of the plots of land that are offered and sold would seldom be economically feasible due to their small size. Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by ... third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments.

328 U.S. at 300. In determining whether the "common enterprise" prong of *Howey* has been met, the Fourth Circuit has followed the horizontal commonality approach, but has not decided whether vertical commonality alone might suffice.[42] *Teague v. Bakker*, 35 F.3d 978, 986, n. 8 (4th Cir.1994) (because profits under the scheme at issue were distributed

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[42]The Circuits have taken three approaches to deciding what a common enterprise means. *See*, Loss & Seligman *Fundamentals of Securities Regulations* at 187-88, noting the following: Several circuits follow the horizontal commonality approach, which focuses on the relationship between investors and requires the pooling of investments. The second approach, broad vertical commonality, is followed by at least two Circuits. It requires that "the fortunes of all investors be dependent on the promoter's expertise." *Id.* at 188. The final approach is strict vertical commonality, followed by the Ninth Circuit. This approach requires that the "fortunes of the investors are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." *Id.* at 189. See also, *S.E.C. v. Pinckney*, 923 F.Supp. at 81 (noting intercircuit and intracircuit disagreements; also noting the approaches of district courts within the Fourth Circuit)

pro rata, horizontal commonality existed and the court did not decide whether some form of vertical commonality might satisfy the second prong of Howey) (citing *Revak v. SEC Realty Corp.*, 18 F.3d 81 (1994)). In *Revak*, the court explained, *inter alia*, that horizontal commonality involves "the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro rata distribution of profits."[43]

b. Analysis

i. Common Enterprise

Moreover, the court finds that plaintiffs have a reasonable likelihood of success in proving the existence of horizontal commonality. First, in the common enterprise of Lloyd's,[44] Names execute a General Undertaking to become a Lloyd's member, agree to place all premiums in trust, provide collateral as security, and annually pay a non-refundable assessment to the Central Fund. (Duguid Aff. I at 3-5). This constitutes the first tier of a two-tier security (Haft Aff. at 8). The second tier occurs when members are placed in syndicates each calendar year. (Haft Aff. at 8) (analogizing syndicates to blind pools).

In this case, sufficient indicia of interdependence between the players in the Lloyd's market has been established to make it reasonably likely that Names invested in the common entity of Lloyd's. As in *Howey*, the "common enterprise" of Lloyd's is essential for Names to receive their paramount aim, a return on their investment. Names are attracted to Lloyd's

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[43]18 F.3d at 87.

[44]"composed of the Corporation of Lloyd's, a/k/a the Society and Council of Lloyd's (the Society) and the association of the operational entities controlled by the Council of Lloyd's." (Haft Aff. at 4).

because of its status and reputation. (Haft at 5). Lloyd's requires Names to "underwrite insurance at Lloyd's exclusively through one or more underwriting agents." (Duguid Aff. I, p. 6). Names depend on Managing Agents to select the risks underwritten through a syndicate, "set premium rates, receive premiums and pay claims to insureds on their behalf." (Duguid Aff. I at 7). And pursuant to the Lloyd's Bylaws, "[T]he [managing] Agent undertakes to the Name that it will comply with the Lloyd's Acts 1871 to 1982 and with the requirements of the Council and will have regard to the codes of practice from time to time promulgated or made by the Council, which are applicable to it as a managing agent at Lloyds." (Duguid Aff I, Exh. I at 170).

Finally, the viability of the Lloyd's market ultimately depends on the success of the syndicates. This is evidenced by the fact that Lloyd's has stated that the market will fail without the Reconstruction & Renewal program. Moreover, both Names and Lloyd's must pass a solvency test each year. And in assessing market solvency, the British Department of Trade and Industry examines the Name's collateral held in trust. (Duguid I at 10). All of these factors demonstrate the interdependence between the many facets of Lloyd's; they also show how the " 'common enterprise' is essential if investors are to achieve their paramount aim of a return on their investments."

Even if Names' participation in Lloyd's does not evidence the interdependence required by *Howey*, plaintiffs have shown a reasonable likelihood of proving that the syndicates in which Names' participate constitute "common enterprises." According to Lloyd's own document, "The market is based upon the principle of risk spreading: each risk is underwritten by a number of syndicates each supported by individual and/or corporate members. The strength of Lloyd's policies lies in the

levels of security provided by the Society's capital base — the resources of its members." (Hudson Aff. II, Exh. D). As such, underwriting risks "gain utility ... only when cultivated and developed as component parts of a larger area."[45] The evidence, thus, demonstrates that the common enterprise of either Lloyd's, the syndicates, or both was essential to Names' aim of obtaining profits, measured by the amount that premiums exceed claims and costs.

ii. The Pooling of Funds

Lloyd's alleges that no common entity exists because "Names do not ... pool funds or share pro rata in returns." (Goelzer I Aff. at 12). "[E]ach Name's profit or loss is computed separately, based on that Name's premiums earned and expenses and liabilities paid." *Id.* Lloyd's also reminds the court that Names are severally liable for the risks they insure. *Id.* Even though absolutely true, the facts that Lloyd's cites in support of its allegations are insufficient to defeat plaintiffs' claim that a common enterprise exists.

According to testimonial evidence, no Name may underwrite the risks of a syndicate alone. As such, the investment in the syndicates is implicitly contingent upon a pooling of capital. Thus, the interdependence of the Syndicates is what transforms them into a common enterprise, rendering the commingling of funds but an administrative detail.[46] In addition to the syndicates, plaintiffs also have established a reasonable likelihood of proving that pooling occurs through Lloyd's Central Fund.

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[45]*Howey*, 328 U.S. at 300.

[46]*See generally, S.E.C. v. Life Partners, Inc.*, 87 F.3d 536, 544 (D.C.Cir.1996).

It is true, as Lloyd's reminds the court, that the Central Fund does not create joint liability among Names or provide them with a right to share the profits of others. It likewise is the case that Names earn no interest on the assets in the funds and receive no dividends. On the other hand, Lloyd's requires every Name to pay annual, non-refundable assessments to the Central Fund. (Duguid Aff. I at 5). Moreover, the Council of Lloyd's has the sole authority to use the Fund's assets to pay the obligations of Names who default. *Id.* Although such Names remain ultimately responsible for repaying the Fund, in the event that they cannot or will not pay, the funds used to satisfy such claims can be said to have come from the pockets of Names, who may belong to entirely different syndicates. Thus, it may be said that the contributing Names share in the losses of other Names. It also may be the case that the Names who benefit from the fund, to the extent that they are judgment proof, can be said to have shared in the profits of the more successful Names. Moreover, the Council of Lloyd's may impose levies to increase the Central Fund, and have done so to "strengthen the future trading position of the Society." (Haft Aff., Exh. 2).

Based on the foregoing factors, the court finds that plaintiffs have shown a reasonable likelihood of success in proving the "common enterprise" prong of *Howey* by demonstrating horizontal commonality. It, therefore, is unnecessary to address whether vertical commonality exists.

3. Names Possess A Reasonable Expectation of Profit, Garnered From the Efforts of Others

a. Rule of Law

The third prong of *Howey* requires that plaintiffs show a reasonable expectation of profit garnered from the efforts of others. In a later case, *United Housing Foundation v. Forman,*

421 U.S. 837 (1975), the Supreme Court provided a fuller explanation of this prong, stating, *inter alia*, that

> By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . . or a participation in earnings resulting from the use of investors' funds . . . . In such cases the investor is "attracted solely by the prospects of a return" on his investment . . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased ... the securities laws do not apply.[47]

In *Teague v. Bakker*, 35 F.3d 978, 987, the Fourth Circuit interpreted the *Howey-Forman* test as requiring: "(1) that the opportunity provided to offerees tended to induce purchases by emphazing the possibility of profits, (2) that the profits are offered in the form of capital appreciation or participation in earnings within the meaning of *Howey* and *Forman*, and (3) that the profits offered would be garnered from the efforts of others."

b. Analysis

i. Reasonable Expectation of Profits

In this case, plaintiffs have proven a reasonable likelihood that as Names, they were led to expect profits solely from the efforts of the promoter or a third party. As described above, Names' role in Lloyd's is that of passive investor. Testimony at trial showed that Names joined Lloyd's for the primary purpose of making money, not because they wished to become insurance underwriters. The testimony also established that Names were solicited to "invest" in the

[47] *Id.* at 852-553 (citations omitted).

Lloyd's Market. Finally, the profits that Names receive, the excess of premium over costs and claims, could only be received if Names pledged their net worth and deposited a letter of credit. As stated by Lloyd's former Chief Executive Officer, the secret of Lloyd's success is uncalled capital because the pledge of capital creates income and profit while allowing use of the capital elsewhere. (Hudson Aff. II, Exh. E). For these reasons, it can be said that, under *Forman*, Names were attracted by the prospects of a return on their investments, rather than a desire to use or consume an item. Thus, plaintiffs have established a reasonable likelihood of success in proving that they expected a profit. Indeed, it would be hard to imagine why Names would accept unlimited liability unless they expected to receive a profit in return.

ii. Dependence on the Efforts of Others

As to the second part of the *Howey-Forman* test, the court finds that plaintiffs have also established a reasonable likelihood of proving that the profits Names expect come "solely from the efforts of the promoter or a third party." *Howey*, 328 U.S. at 299. As discussed above, Names must delegate underwriting authority to Managing Agents. (Duguid Aff. I, Exh. I at 170). And as also noted earlier:

> [Names] have no management authority and cannot bind their fellow members or the syndicate . . . . Managing Agents run the syndicates . . . . An employee of the managing agent, known as the "active underwriters" acts on behalf of the Names in a syndicate in the "buying" and "selling" of insurance risks . . . The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will assume."

Roby v. Corporation of Lloyd's, 796 F.Supp. at 104-5 (citing *Syndicate 420 at Lloyd's London v. Early American Insurance Co. Ltd.*, 796 F.2d 821, 824 (5th Cir.1986)).

Thus, Names' participation in the Lloyd's insurance market is nominal only. The simple fact that Names may select the syndicates through which they underwrite would not alter this conclusion. Most courts agree that the term "solely" in the *Howey* test should not be read literally. Rather, these cases have held, that the question should be whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.[48] Certainly, the facts, heretofore mentioned, meet this test.

iii. Names are Not Primarily Dependent Upon Uncontrollable Events

Lloyd's alleges, however, that Names' return is "dependent upon uncontrollable or unpredictable events." (Goelzer Aff. I at 14). This, says Lloyd's, shows that Names' gain or loss is "independent of anyone's managerial efforts." (Goelzer Aff. I at 15). In support of this position, Lloyd's relies in part on the case *SEC v. Life Partners Incorporated*, 87 F.3d 536 (D.C.Cir.1996). The facts of this action, however, are factually distinct from those in *Life Partners*. There, the court found that those who purchased fractional interests in life insurance policies from an entity that matched such purchasers to terminally ill insureds did not sufficiently depend upon the

[48] *See e.g., Teague v. Bakker*, 35 F.3d at 986 n. 7 (" 'Despite the restrictive language of the third prong of the test, later courts have explained that a program requiring some effort from the investor may still constitute an 'investment contract,' but the most essential functions or duties must be performed by others and not the investor.' " (quoting *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 920 (4th Cir.1990)).

managerial efforts of the entity to satisfy *Howey*. In *Life Partners*, the court found that the combination of the entity's pre-purchase services were insufficient. On the other hand, the court found that the length of the insured's life was of "overwhelming significance" to the value of the purchasers interests. In this action, like *Life Partners*, the Names' profits depend on factors beyond everyone's control. Unlike *Life Partners*, however, in this case, many significant managerial decisions are made after the Names purchase their membership in Lloyd's.

For instance, Syndicates are selected on the advice of Member Agents, and "[t]he active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will assume." *Roby*, 796 F.Supp. at 104-5. That these services are more than ministerial is confirmed by Lloyd's own document, "Lloyd's is renowned for its underwriting expertise in major infrastructure projects, in risks associated with the nuclear industry, the insurance of fine arts and jewelry, many forms of professional indemnity ..." (Duguid Aff. II, Exh. D.).

In conclusion, the court finds that plaintiffs have demonstrated a reasonable likelihood of success in proving that Names' participation in Lloyd's and its syndicates constitute a security.

B. It is Reasonably Likely that Names' Interests in Equitas that Lloyd's is offering Constitute Securities

1. Background

Plaintiffs allege that the interests in Equitas that Lloyd's is offering constitute 'investment contracts' and thus "securities"

under § 2(1) of the Securities Act, 15 U.S.C. § 77b(1). Specifically, plaintiffs claim that Lloyd's seeks £150 million in new capital from 2,500 American investors to finance Equitas. Lloyd's contends, however, that each of the elements of the investment contract alleged by Plaintiffs to exist is, in fact, a quintessential feature of an insurance contract. At least as currently configured, Equitas exists solely to provide reinsurance for pre-1993 liabilities. And thus, Lloyd's asserts that the plaintiffs are simply paying a reinsurance premium, not investing. For the following reasons, this court concludes that plaintiffs have a reasonable likelihood of success in proving that Lloyd's is offering to sell Names an "investment contract" in Equitas.

2. Names Invest Money in Equitas

It is clear that plaintiffs are "investing" funds in Equitas. Plaintiffs will pay the premiums for reinsurance and will also contribute their existing funds at Lloyd's. (Haft Aff. at 3). Lloyd's alleges, however, that Names' premiums are individually calculated and based solely on their pre-1993 liabilities. Therefore, Names are purchasing a service, reinsurance, not making an investment. This argument is too simplistic.

Trial testimony indicated that Equitas' start-up costs as well as the cost of the reserving process are built into the Equitas premium. Moreover, evidence also exists to support plaintiffs' claim that they are "investing" in the capital of the Equitas company. The companies in the Equitas group are private limited companies. (R&R Settlement Offer, July 199, p. 83). And according to testimony at trial, Names' Equitas premiums constitute a significant portion of the assets of Equitas. Finally, during the formation of Equitas, Lloyd's characterized the payments by reinsured Names as one source of "capital;" the other possible sources being external investors and Lloyd's guarantee fund. (Duguid Aff. II, Exh. C, D).

That Names' payments to Equitas clearly constitute "tangible and definable consideration" seems evident. Thus, the only issue is whether this consideration was given in "return for an interest that ha[s] substantially the characteristics of a security." *Daniel*, 439 U.S. at 560. As explained below, the interest in Equitas that Names will receive bears sufficient indicia of a security to preclude this court from finding, without the benefit of a full record, that plainffs have no reasonable likelihood of success.

3. Equitas is a Common Enterprise

The court finds that, because reinsuring to close pre-1993 liabilities depends upon the centralization and common management of Equitas, and because the rebate of premiums to Names will be based on Equitas' aggregate surplus reserves, plaintiffs have shown a reasonable likelihood of success in proving that Equitas is a "common enterprise."

a. Howey Test

In Howey, the court found a common enterprise to exist because interdependence was essential to achieving the investors aims. The court finds that plaintiffs have shown a reasonable likelihood of success on proving that Equitas meets this test.

First, the primary purpose of Equitas, the reinsurance of pre-1993 liabilities, could not be accomplished on a syndicate-by-syndicate basis. Indeed, at trial, Mr. Sandler emphasized this as a reason why Equitas was a key element to R&R. Moreover, Lloyd's own documents prove that centralizing the reinsurance of pre-1993 claims is essential.

> [o]ne of the premises behind NewCo [renamed Equitas] is that the efficient management of long tail

> liabilities is hindered, not helped, by the structure of Lloyd's. Internal competition provided by Lloyd's syndicate structure has helped the market win business over the years. But in handling long tail liabilities, the decentralised syndicate system is flawed. Centralisation promises major savings.

(Duguid Aff. II, Exh. C). In fairness, it must be noted that the previous statement was made in the very early stages of the Equitas project. On the other hand, Mr. Sandler's trial testimony confirms that Lloyd's view about the need for centralization has not changed. For the foregoing reasons, the Court finds that there is a reasonable likelihood that plaintiffs will succeed in proving sufficient "interdependence" to find a "common enterprise."

b. Horizontal Commonality

Plaintiffs have also demonstrated a reasonable likelihood that Equitas meets the horizontal commonality test for determining whether a common enterprise exists. In *Teague v. Bakker*, 35 F.3d at 986, n. 8, the court cited to *Revak v. SEC Realty Corp.*, 18 F.3d 81 (2d Cir.1994). As such, this Court will look to *Revak* for guidance. In *Revak*, the court explained that 'horizontal commonality' involves "the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits."[49]

Lloyd's contends that Equitas is not a common enterprise because Names will not share in its profits or losses. Lloyd's also points out that Names have no right to the assets of Equitas and that Names remain severally liable. These facts, even if true, do not prevent a finding that horizontal commonality

[49]18 F.3d at 87.

exists. Indeed, other more persuasive evidence exists to support the plaintiffs' position. First, the "assets of Equitas will be pooled." (R&R Settlement Offer, July 1996, p. 98). This is one of the linchpins in finding horizontal commonality. Second, testimony at trial indicated that premiums of Equitas would be invested, subject to claims being paid. Furthermore, to the extent possible, Equitas will pay a portion of its surplus to Names by way of rebating Names Equitas premium. (R&R Settlement Offer, July 1996, p. 98). This return premium, however, "will be based upon Equitas' aggregate surplus reserves and not upon the outcome of a particular syndicate's liability." *Id.* If this statement means what it purports to on its face, it would seem to follow that if a particular Syndicate successfully closes all of its claims (and would otherwise be entitled to a return of the excess of premium paid over costs plus claims), the Syndicate could not receive a premium rebate unless Equitas as a whole has a surplus. It is hard to see how one could characterize this as other than a "sharing in the profits and losses" of Equitas. As such, this court cannot agree with Lloyd's view that Names' participation in Equitas constitutes an example of "multiple purchasers of the same good from a common provider."

Likewise, with regard to the sharing of losses, the court finds the following statement particularly relevant,

> As a result of the pooling of assets in Equitas the risk of subsequent unforeseen deterioration will be shared between all Names; whereas, if this pooling did not take place, there would be every probability that serious deterioration would subsequently affect at least one syndicate, but no way of telling now which one. Thus, the pooling of assets in Equitas provides a degree of protection for Names against subsequent deterioration which may be of particular interest to members of long-tail syndicates.

> Of course, pooling involves a corresponding degree of risk, because the sharing of risk cuts both ways: sharing risk with others involves taking on part of their risk as well as sharing out part of own's own. Accordingly, many Names have voiced concerns to the effect that, if Equitas fails, particular Names may find that their reserves have been used to settle liabilities of other Names and they will remain liable to policyholders in respect of risks originally underwritten by them. This risk is particularly acute for members of long-tail syndicates, whose liabilities are more likely to be still outstanding at the time of failure. (Hudson Aff. II, Exh. A at 16).

For the above-mentioned reasons, plaintiffs have succeeded in proving a reasonable likelihood of success on the question of whether Equitas is a "common enterprise."

4. Names Have a Reasonable Expectation of Profit Garnered From the Efforts of Others

a. Background

Proving that Names have a "reasonable expectation of profit" from Equitas constitutes plaintiffs' biggest hurdle. *Teague v. Bakker*, 35 F.3d at 987, sets forth the standard in the Fourth Circuit. The court must find: "(1) that the opportunity provided to offerees tended to induce purchases by emphasizing the possibility of profits, (2) that the profits are offered in the form of capital appreciation or participation in earnings within the meaning of *Howey* and *Forman*, and (3) that the profits offered would be garnered from the efforts of others."

Lloyd's contends that plaintiffs have no reasonable expectation of profit. Equitas will make no distributions, and Names will not realize capital appreciation. Moreover, Plaintiffs' only

basis for arguing that Lloyd's has "marketed Equitas" in a manner that emphasizes profit, Lloyd's claims, is incorrect. First, Equitas is not being "marketed" because Names are *required* to purchase the reinsurance. Moreover, Lloyd's claims that the statements that plaintiffs' rely upon as emphasizing Equitas' "profit potential," were located in documents that have since been superseded. Furthermore, premium rebates are common in reinsurance contracts, and the claim that loss avoidance constitutes a profit is meritless. The expectation of an insured that his insurer will honor its contractual obligations cannot possibly reflect an expectation of profits.

Plaintiff replies to Lloyd's assertions by noting that Names own the right to receive a 'return premium.' Moreover, plaintiffs' claim that the court should not disregard Lloyd's earlier representations about the potential to share in Equitas' profits. Finally, plaintiffs allege that Names have an expectation of profits "in the sense of loss avoidance."

It is worth beginning the discussion by disposing of any misconception about the payment of dividends by Equitas. Although at some point in the development of Equitas, Lloyd's had contemplated that Names would receive dividends, the final Equitas Articles of Association prohibit the payment of such dividends. (R&R Settlement Offer, July 1996, p. 95). Moreover, dividends cannot be paid without the permission of the British government's Department of Trade and Industry. (Duguid Aff. II, Exh. G).

The next issue to address is plaintiffs' claim that the "ownership of rights to rebate premiums constitutes a profit," and Lloyd's reply that "premium refund provisions are an integral part of reinsurance agreements." The court finds Lloyd's argument irrelevant. A "profit" is a "profit" no matter what type of business it emanates from. Plaintiffs' argument fares no bet-

ter, however. In *United Housing Foundation, Inc. v. Forman*, the Court noted that a rebate was not the type of profit associated with securities. 421 U.S. 837. In any event, any notion that Lloyd's is marketing Equitas as a way to profit from rebates should be dispelled by its current statements that "[n]o return premium is expected to be paid for several years, if at all." (Duguid Aff. I ¶25; R&R Settlement Offer, July 1996, p. 98).

The court also has difficulty with plaintiffs' second argument. Plaintiffs allege that Names will profit in the sense of loss avoidance, as is the case of a "put," a type of stock option. As such, plaintiffs contends that Names' primary motivation in investing in Equitas is to limit their pre-1993 losses. The profits anticipated by Names is the amount by which losses avoided exceed the Equitas premium. (Haft. Aff. at 6). The problem the court finds with this analysis is that it may prove too much. In other words, avoidance of loss is the whole point of purchasing insurance. Even with this misgiving, however, this court is not prepared, without the benefit of a full record, to conclude that no reasonable likelihood exists regarding plaintiffs' contention that loss avoidance constitutes profits. This conclusion finds support in Lloyd's assertions that Names would be in worse trouble should Equitas fail.

Finally, assuming that Names expect profits from the Equitas transaction, there is no question that such profits would be derived from the efforts of others. Names have no control over Equitas' management or business decisions, and do not vote for the trustees. (R&R Settlement Offer, July 1996, p. 93). For the above mentioned reasons, this court finds that plaintiffs have a reasonable likelihood of success in proving that through Equitas Names expect to profit from the efforts of another.

5. Conclusion

In conclusion, this court finds that plaintiffs have a reasonable likelihood of success in proving that Names' participation in Lloyd's and its syndicates, as well as the Equitas transaction, do not fall within the insurance exemption to the securities acts. This court also finds that plaintiffs have a reasonable likelihood of success in proving that the same constitute "investment contracts" and are thus "securities."

C. It is Reasonably Likely that Lloyd's Has Violated Section 14(a) of the Securities Exchange Act of 1934

1. Background

Having found that plaintiffs have a reasonable likelihood of success in proving that Names' investment in Lloyd's and its syndicates constitute securities under the 1933 and 1934 Acts, the analysis now focuses on plaintiffs' substantive claims. Plaintiffs seek a preliminary injunction under §§ 14a and 10b of the Exchange Act.[50] Specifically, they have asked to enjoin Lloyd's from: soliciting or obtaining any proxy or consent or authorization of any Names to accept the Reconstruction & Renewal proposal; soliciting or requiring Names to invest in Equitas; or soliciting or requiring Names to exchange their existing securities for new securities in Equitas, unless defendants comply with federal securities laws.

First, plaintiffs have moved for a preliminary injunction under § 14a of the Exchange Act of 1934, as amended, 15 U.S.C. § 78n(a). Section 14a, *inter alia*, prohibits the use of United States Mail or instrument of interstate commerce to solicit

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[50]15 U.S.C. § 78n; 15 U.S.C. § 78j.

proxies in contravention of SEC rules and regulations.[51] Plaintiffs allege that Lloyd's seeks Names' proxy or consent or authorization with respect to the R&R plan and the creation and capitalization of Equitas.

Plaintiffs further allege that Lloyd's has neither filed a written proxy statement with the SEC, nor has it furnished a proxy statement to each of the Names as required by SEC Rule 14a-3, 17 C.F.R. §240.14a-3. Finally, plaintiffs allege that Lloyd's has failed to disclose material facts to the Names in connection with its proxy solicitation, in violation of SEC Rule 14a-9, 17 C.F.R. §240.14a-9.

2. Equity Securities

As a threshold matter, this court must determine whether plaintiffs have established a reasonable likelihood of success in proving that the Lloyd's securities held by Names constitute "equity securities."[52] Section 14(a) applies "only in respect of any security ... registered under section 12 of this Act."[53] Plaintiffs also contend that Lloyd's securities are subject to registration under section 12(g)(1) of the 1934

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[51]Section 14a provides "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to § 12 of this Act." Section 14a of the Securities Exchange Act, 15 U.S.C. § 78n(a).

[52]No other aspect of section 12(g) was contested.

[53]15 U.S.C. § 78n(4).

Act.[54] Section 12(g) by its terms applies only to "equity securities." [55]

Section 3(a)(11) of the 1934 Act defines equity security as:

> ... any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security. 15 U.S.C. § 78c(a)(11).

The SEC has broadened the definition of equity security to include:

> any stock or similar security, certificate of interest or participation in any profit sharing agreement,

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[54]15 U.S.C. 781(g)(1); SEC Rule 12g-1, 17 C.F.R. § 240.12g-1. Section 12(g)(1)(B) provides that "Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall ... within one hundred and twenty days after the last day of its first fiscal year ended after two years from July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons, register such security by filing with the Commission a registration statement ... containing such information and documents as the Commission may specify ..."

[55]Plaintiffs claim that the obligation to register under § 12(g)(1) of the Exchange Act triggers the application of 14(a); actual registration is not required. (Reserve Life Ins. Co. v. Provident Life Ins. Co., 499 F.2d 715, 723-25 (8th Cir); *cert. denied*, 419 U.S. 1107 (1975). This claim was not contested by defendant.

> preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of a buying such a security from or selling such a security to another without being bound to do so. 17 C.F.R. § 240.3a 11-1.

Lloyd's alleges that the term "equity security" constitutes a distinct subset of securities. Lloyd's also argues that in determining the existence of an equity security, the SEC and courts have looked to whether the putative securities are actively traded. In this case, Lloyd's alleges that no such trading occurs. Plaintiff responds by claiming that all securities are either debt or equity securities and that the Lloyd's securities bear greater resemblance to equity securities than to debt.

As a preliminary matter, the court must dispose of Lloyd's contention that the inclusion of the term 'investment contract' in the definition of "security, and its omission from the definition of "equity security" demonstrates that the Commission did not intend "investment contracts' to be treated as equity securities. (Goelzer Aff. II at 3). This argument may be sound as an aid to statutory construction, but in this case, it is misplaced. "Treasury stock is an 'equity security' even though it is expressly included in the definition of 'security' and not specifically mentioned in the definition of equity security." L. Loss, J. Seligman, Fundamentals of Securities Regulation, at 584. Moreover, at least one court indirectly recognized that investment contracts may be equity securities. *Wals v. Fox*

Hills Development Corp., 24 F.3d 1016, 1018 (7th Cir.1994) (Noting that investment contracts identify "unconventional instruments that have the essential properties of a debt or equity security").

On the other hand, support exists for Lloyd's contention that by the term "equity securities," Congress meant to include only those securities that are actively traded. *See E.H.I. of Florida, Inc.*, 652 F.2d 310, 314 (3rd Cir.1981) (Noting that Senate Hearings indicate that "the term was intended to encompass stocks and similar securities that were prone to speculative trading"). That, however, is insufficient to preclude a finding that plaintiffs have a reasonable likelihood of success because limited partnership interests are included in the SEC's definition of equity security, even though such interests are not publicly traded. *See generally*, Loss, Seligman, Securities Regulation, 2415 (1990).

a. Characteristics of Debt and Equity Securities

The plaintiffs' claim, that securities are either debt or equity securities, requires an examination of the characteristics that distinguish such interests. Equity securities "evidenc[e] an ownership interest and usually includ[e] a right to share in profits." *Braniff Airways, Inc. v. LTV Corp.*, 479 F.Supp. 1279, 1287 (N.D. TX 1979); see also *E.H.I. of Florida, Inc. v. Insurance Company of North America*, 652 F.2d 310, 315 (3rd Cir.1981) (long term debt is not an equity security); *United States v. Evans*, 375 F.2d 730, 731 (9th Cir.1967) (noting in tax case that " '[t]he characteristics of *stock* are a right to participate proportionately in all profits, and in management, and in the distribution of net assets on liquidation;' " stock cannot expire at death of owner) (citation omitted).

Debt securities, such as bonds, "are entitled only to a fixed rate of interest; they do not share in the profits or losses of the corporation." *E.H.I.*, 652 F.2d at 315 (long-term debt are not equity securities). Other characteristics of debt include an obligation to pay the holder of the security a stated amount of money at a certain time and under certain conditions; it is essentially a contract for repayment of a loan. *Braniff Airways*, 479 F.Supp. at 1287-88. See also, *Evans*, 375 F.2d at 731 (noting in tax case that the " 'characteristics of a note are a definite obligor, a definite obligee ... a definitely ascertainable obligation, and a time of maturity ...' ") (citation omitted).

In *United States v. Evans*, 375 F.2d at 731, the Ninth Circuit cited to the Supreme Court for the proposition that " '[t]here is no one characteristic, not even exclusion from management, which can be said to be decisive in the determination of whether the obligations are risk investments [stock] in the corporation or debts.' " *Id.* at 731 (citation omitted). The court then examined the characteristics of the purported stock to determine whether it more closely resembled a stock or debt.

Although *Evans* involved issues of federal taxation, applying the Ninth Circuit's analysis to the case at hand, this court notes that Names' investment in Lloyd's bears none of the attributes of debt. There is no obligation by a certain obligor to pay Names a fixed amount or at a fixed date. On the other hand, Names' investments bear some resemblance, albeit a minimal amount, to an equity security. First, Names have limited participation in management. They are represented on the Council of Lloyd's and are entitled to vote in limited circumstances. For instance, Names were asked to vote to approve the special Central Fund contributions. (Hudson Aff. I, Exh. Q at 2). Moreover, procedures exist whereby Names

may revoke or annul a bylaw promulgated by the Council. (Duguid Aff. II ¶ 7).

On the other hand, in many respects, Names' interests in Lloyd's do not bear the characteristics of an equity security. A perfect fit, however, should not be expected. Nor is it required. Congress could not, nor did it try to, anticipate all the forms that an 'equity' security may take. That is why Congress left it to the SEC to promulgate "... such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." 15 U.S.C. § 78c(a)(11). In this case, not only is Lloyd's a foreign entity, but its structure is quite unique.

When confronted with such a situation, a court may take one of two approaches. It can note that the new, unique or irregular construct does not fit within the law and thus hold the law does not apply. Alternatively, a court can look to the language of the statute and "read the text in the light of context and ... interpret the text so far as the meaning of the words fairly permit so as to carry out in particular cases the generally expressed legislative policy." *Greater Iowa Corporation v. McLendon*, 378 F.2d 783, 795 (8th Cir.1967) (quoting *S.E.C. v. C.M. Joiner Leasing Corporation*, 320 U.S. 344 (1943). This court chooses to follow the latter approach.

b. Legislative Purposes

In *Greater Iowa*, 378 F.2d at 783, the court examined whether the solicitation of membership in a voting trust arrangement constituted the solicitation of a "proxy or consent or authorization" under § 14(a) of the 1934 Act. The court noted that " 'The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief

that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange ...' " 378 F.2d at 795 (quoting *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119 (1953)).

Ultimately, the *Greater Iowa* court ultimately held that plaintiffs had stated a claim under § 14(a) and that the district court had erred in granting summary judgment to the defendant. In so holding, the Eighth Circuit reasoned that it would be wholly at odds with the policies of the statute to permit the defendants in the case to do indirectly what they clearly could not do directly — solicit votes on registered shares without proper disclosures:

> The dangers and possible abuses are equal to the dangers and abuses attached to the solicitation of the most orthodox form of proxy * * * Courts should hesitate to sanction a result which thwarts established legislative purposes, or allows a skirting of the law merely on the basis of form * * * [I]f the solicitation of voting trust membership can fairly and reasonably be interpreted as a solicitation of a proxy or consent or authorization, thus bringing it within the jurisdiction of the Commission regulation, such an interpretation will be attached.

378 F.2d at 795-96 (citations and quotations omitted).

Although the facts presented in *Greater Iowa* differ from those involved in this action, the reasoning of the that court provides a helpful construct in deciding whether Names' interests in Lloyd's constitute equity securities, and thereby trigger the application of section 14(a).

Greater Iowa teaches that Congress intended to regulate the unorthodox or unique along with the common. As explained above, Lloyd's structure is neither traditional nor in conform-

ance with business forms in this country. *Greater Iowa* also teaches that where the abuses and dangers of the unorthodox are the same as those which Congress intended to prevent, the court should look to substance over form so to promote Congressional intent. Thus, if something can 'fairly and reasonably' be characterized as falling within the statute, that interpretation is preferred. For all of the foregoing reasons, this court concludes that Names have a established reasonable likelihood of proving that Names investment in Lloyd's constitutes an equity security.[56]

c. Section 14(a) of the Securities Exchange Act of 1934

Having crossed the threshold issue, the substantive claims must now be addressed. It is important to note what is not at issue. There is, for example, no contest to plaintiffs' asserted standing under the 1934 Act pursuant to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Nor is it contested that Lloyd's has used the United States mails and interstate commerce to communicate with Names respecting their original investment in Lloyd's and the R&R plan. On the other hand, Lloyd's contends that the proxy rules do no apply because Names are not being solicited for a vote, consent or proxy. Rather, Names are simply being asked whether they will accept an individually tailored settlement offer.

A brief discussion of the facts is merited. Lloyd's has posited a choice to Names. Names may either: (1) accept the settlement offer, waive all claims against Lloyd's and its members, reinsure with Equitas, and receive a credit toward the payment of Equitas premiums; or (2) reject the settlement offer, reinsure with Equitas anyway, and be sued. Frankly, Lloyd's

[56]It was not contested that Lloyd's meets the number of people and assets required by § 12(g).

has stuck Names right between the proverbial rock and the hard place. Moreover, to help Names consider these options, Lloyd's has sent documents. These documents contain disclaimers of liability, providing in part that neither Lloyd's nor its members are responsible for losses occasioned by any person who relies on the information therein. Managerial strong arm tactics, such as these, provide a potent example of the abuses that the federal securities laws seek to prevent.

Lloyd's contends that the purpose of section 14(a) is to protect the integrity of corporate suffrage, and that, therefore, the section applies only when managers are required to seek shareholder approval. Lloyd's then notes that England does not give Names the right to vote on either the implementation of the settlement offer or the reinsurance of Names' underwriting obligations through Equitas. Because no vote is required, the proxy rules do not apply, according to Lloyd's.

The Court begins this analysis, mindful that "[b]y including [the terms proxy or consent or authorization] in the disjunctive, we believe Congress intended to cover the entire field of solicitation for corporate control and all of the various solicitation situations which might arise from time to time, whether conventional, novel or unorthodox." *Greater Iowa*, 378 F.2d at 796. As noted earlier, Lloyd's has posed a tough choice to Names; waive all claims against us and we will sweeten the Equitas pie or reject the settlement and we will sue. Lloyd's also has indicated that the Equitas deal will not go through unless a sufficient number of Names accept the settlement offer. Thus, Lloyd's has selected to make the settlement offer and waiver of claims, both of which require the individual consent of each Name, part and parcel with the Equitas deal.

Consequently, even assuming that under English law, no vote by Names would be required with regard to the Equitas structure, Lloyd's can hardly argue that a "vote" by or at

the very least the "consent" of Names would be required. To hold otherwise, would be to ignore the warning of *Greater Iowa*, that "Courts should hesitate to sanction a result which thwarts established legislative purposes, or allows a skirting of the law merely on the basis of form." *Id.* at 795-96. This court finds that, as did the court in *Greater Iowa*, a corporation or manager should not be able to do indirectly what cannot be done directly, especially where the dangers that result from the action are virtually the same as those that Congress sought to protect against.

Having previously noted the purposes behind the securities laws as encouraging full and fair disclosure, suffice it to say that this court finds that plaintiffs have a reasonable likelihood of success in proving that Lloyd's has solicited the Names' "vote," or at the very least, that Lloyd's has solicited their "consent" for the Equitas package.[57]

The final issue that plaintiff must demonstrate to make a claim under section 14(a) is that Lloyd's solicitation was in contravention of SEC rules. SEC Rule 14a-3 prohibits the solicitation of a proxy unless each person is currently furnished or has been previously furnished with a proxy statement filed with the SEC. Plaintiffs allege that Lloyd's has not filed with the SEC. And the court finds that plaintiffs have a reasonable likelihood of success in proving this claim.

Plaintiffs also allege that Lloyd's has violated SEC Rule 14a-9, which prohibits the solicitation of a proxy or consent

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[57]Plaintiffs have also demonstrated a reasonable likelihood of proving that a "solicitation" occurred. SEC Rule 14a-1 defines solicitation to include "[t]he furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." Testimony at trial demonstrated that Lloyd's has communicated with Names to encourage their support for the Reconstruction & Renewal Program by sending numerous documents and conducting information meetings.

or authorization by a communication which omits any material fact in order to make the statements not misleading. Testimony and argument at trial demonstrated that Lloyd's has omitted material facts necessary for Names to make a decision regarding the Equitas transaction, including the basis for determining Names' liabilities, the basis for determining Names' Equitas Premiums, and the basis for the reserving process. As such, the court finds that plaintiffs have demonstrated a reasonable likelihood of success on the merits of this claim.

In conclusion, for the foregoing reasons, the court concludes that plaintiffs have a reasonable likelihood of success in proving that Lloyd's has and is continuing to violate section 14(a) of the 1934 Act. It is, therefore, not necessary to determine whether plaintiffs have a reasonable likelihood of success in proving a violation under section 10(b) of the 1934 Act and SEC Rule 10b-5, promulgated thereunder.

IV. THE PUBLIC INTEREST

The exercise of a court's injunctive power can affect people and institutions not parties to the litigation in which the injunction is sought. For that reason, and because the public good is always to be taken into account when a court's extraordinary power of injunction is to be exercised, the *Direx Israel* calculus requires assessment of the public interest. We now turn to that assessment.

Because Lloyd's activities fall within the purview of the securities laws, it is obvious that the enforcement of those laws is a matter of public interest. And, of course, that factor weighs heavily in favor of an injunction. More specifically, the importance of the public policy of prospective, broad-based disclosure in securities transactions, as evidenced by the inclusion of the anti-waiver provisions, further weighs in plaintiffs' favor.

There are contentions here that an injunction would disrupt the Lloyd's insurance market, the United States insurance market and even the entire United States economy, perhaps well into the future. Those positions, in varying degrees, have been taken by the representatives of the insurance industry charged with the regulation of insurance in California, Louisiana and New York, and by the National Association of Insurance Commissioners.

In response, the plaintiffs point to the report of Westin who, on the basis of his experience, avers that the domino affect on insurance projected by the New York and California insurance commissioners simply is unlikely to occur. In part, he bases this opinion on the relatively small quantity of insurance issued in the United States by Lloyd's. The plaintiffs also point to the California securities regulators and the New York Attorney General who favor enforcement of the securities laws with full knowledge of what the insurance officials in their states have said about the consequences of any injunction.

The two affidavits of Mr. Duguid, the Secretary of the Society of Lloyd's, also forecast dire results from even the briefest of injunctions because the R&R proposal could not go forward on schedule. That, of course, is something that the authors of this proposal could have considered long before they decided to proceed upon a schedule which would force the Names to an election within less than 30 days on very little information.

The clear record here is that since May 1995, Lloyd's has known that the Central Fund faced diminution in August 1996. The analysis of Lloyd's own records and the reserving process, underway since 1993, would have permitted an earlier schedule had Lloyd's elected to pursue it. Contrary to the decision in the *Queen v. Lloyd's, ex parte Johnson*, High Court of Justice, Q.B. CO/2577-96 (August, 1996), this court cannot fault the Names for their failure to advance their contentions

earlier. The development of this R&R has been in flux and subject to change from time to time and even today is not final.

Considering the changing nature of the R&R plan, it is certainly reasonable for the Names to have awaited what Lloyd's proffered as a final document before taking legal actions. This is particularly so where, as here: (i) the counsel to the Validation Steering Group, Slaughter & May, represented that, when the final offering was put forth, it would, or should, be accompanied by a prospectus disclosing the pertinent financial foundations for the information presented in the R&R; and (2) where Lloyd's itself touted that report to Names as evidence of the reasonableness of the R&R.

The disastrous results portended by DTI, the insurance commissioners of California, New York and Louisiana and the Lloyd's affidavits also ignore the fact that this market has functioned in this posture for a considerable period of time without the disastrous results forecast in opposition to the grant of injunctive relief.

Moreover, the insurance commissioners and the DTI have it within their power to alter the solvency test deadline to allow for the brief period of time required to make the disclosures necessary to allow the Names to determine which of the options given them by Lloyd's they should exercise. In any event, it is clear from the financial records that Lloyd's, itself, has the financial capacity to avoid the dire results it claims might ensue the grant of limited preliminary injunctive relief.

Finally, the disastrous, domino effect results projected by the insurance commissioners and Lloyd's is based on the fundamentally erroneous assumption that a preliminary injunction would simply stop the consideration of the R&R plan in its entirety. While, they may be correct that an injunction of that scope would have that affect, this court will not grant an injunc-

tion which reaches that far. This is a particularly necessary result where, as here, 90% of those who would be affected by an injunction of that scope have no entitlement to protection by the securities laws of this country. It is even more true when, as also is true here, a substantial number of such persons have indicated in various ways that they intend to accept the R&R. Indeed, some American Names have appeared by affidavit indicating that they wish to accept the R&R.

It is settled beyond question that the scope of injunctive relief is to be tailored to the particular circumstances and should be drawn narrowly so as to protect the status quo and effectuate the right sought to be vindicated with the least possible adverse impact on the rights of others. In this case, this policy of judicial restraint as to the scope of injunctive relief counsels toward the grant of an injunction which will affect Lloyd's dealings only with the American Names. Lloyd's failure to disclose injures every American Name, and this injury stems directly from the failure on Lloyd's part to comply with § 14 of the 1934 Act and the regulations promulgated pursuant to that section. Because Lloyd's activities fall within the purview, and are in derogation of, United States' securities laws, injunctive relief here should affect all those, *but only those*, who are entitled to the protections of those laws.[58] This is especially

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[58]The Court rejects Lloyd's argument that any preliminary injunction should be limited to only the individually-named plaintiffs before this Court. Lloyd's argument is directly contrary to the law in the Fourth Circuit. *See Thomas v. Washington County School Bd.*, 915 F.2d 922 (4th Cir.1990) ("The fact that [the plaintiff] did not bring a class action is of no moment . . . . This is so because the settled rule is that whether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack") (quoting *Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173 (4th Cir.1978)); *Evans v. Harnett County Bd. of Educ.*, 684 F.2d 304, 305 (4th Cir.1982) ("An injunction warranted by a finding of unlawful discrimination is not prohibited merely because

(footnote continued)

appropriate where, as here, it has been represented by counsel for plaintiffs that some 300 to 400 American Names have asked to join the action as plaintiffs, and a group of approximately 1000 Names in the American Names Association have filed pleadings in support of the relief herein granted.

The injunction to be issued here, therefore, will affect only the American Names who do not wish to accept the R&R proposals, and it will require, that, as to those Names, Lloyd's make the disclosures to which they are entitled under the securities laws of the United States and that Lloyd's will take no action in respect of the American Names which will deprive them of their right to exercise the option, to accept or reject, the R&R after they receive the disclosures to which they are entitled. In addition, to facilitate the orderly, fair and efficient administration of justice and to help preserve the court's

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(footnote continued)
it confers benefits upon individuals who are not plaintiffs or members of a formally certified class'').

Moreover, as the plaintiffs have pointed out, in an overwhelming number of cases in which a preliminary injunction was granted enjoining a defendant from conduct that violated § 14(a) of the 1934 Act, the scope of the relief was shareholder-wide, even though none of these cases was brought as a class action. *See, e.g., Union Pac. R.R. v. Chicago and Northwestern R.R.*, 226 F.Supp. 400, 414 (N.D.Ill.1964) (enjoining the holding of a shareholder meeting based on violations of SEC Rule 14a-9); *Schoen v. AMERCO*, 885 F.Supp. 1332 (D.Nev.1994) (issuing injunction requiring curative disclosures based on violations of SEC Rules 14a-3, 14a-6 and 14a-9); *Chambers v. Briggs & Stratton Corp.*, 863 F.Supp. 900 (E.D.Wisc.1994) (enjoining voting of proxies based on violation of SEC Rule 14a-9 until material omissions were adequately cured); *CNW Corp. v. Japonica Partners, L.P.*, 874 F.2d 193 (3rd Cir.1989) (issuing preliminary injunction against shareholder vote based on violations of § 14(a) until required disclosures are made); *See also* Brief in Support of Plaintiffs' Motion for Preliminary Injunction, at pp. 26-27 n. 13 (citing cases which granted shareholder-wide relief despite the fact that none of these cases were brought as a class action)

jurisdiction and the status quo, the American Names will be required to post in escrow under the control of this Court the amounts assessed in their Finality Statements in order to take advantage of that relief. Counsel for plaintiffs concur in that approach.

Under those circumstances, the appropriate balance to strike in considering the public interest is to enforce the laws of the United States while at the same time limiting the injunction in such a way as not to affect adversely the rights of others who are not affected by those laws or entitled to the protection that the Congress of the United States sought to impose in effectuating them.

CONCLUSION

For the foregoing reasons, the motion to dismiss filed by Lloyd's is denied and the motion for preliminary injunction is granted. An appropriate Order shall issue.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/ Robert E. Payne

United States District Judge

Richmond, Virginia
Date: August 23, 1996

APPENDIX E

FILED:
September 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2158

LOUIS F. ALLEN; CARL K. BAKER; JOYCE P. BAKER; PETER D. BERRINGTON; OLIVER BIRCKHEAD; FLORENCE BLAUSTEIN, MARY L. BRAY; T. K. BROOKER; DONALD J. BROOKS; JOSEPH CALLAGHAN; JAMES CASSEL; TERRY G. CHAPMAN; J. A. CLAWSON; JOHN K. COLVIN; FRED B. COX; JOHN RAWLYN CHARLES CRABTREE; CHRISTOPHER P. CLUP; GORDON C. DAVIDSON; RUTHERFORD DAY; DONALD D. DOTY; M. D. A. EMBLIN; AUDREY FISHER; DONALD B. GIMBEL; KENNETH J. GIMBEL; KATHERINE GOOCH; B. G. HARRISON; YUMIKO HONDA; HERBERT W. HOOVER, III; MARGARET W. JONES; DONALD K. KENT, E. R. KINNEBREW, III; WALTER J. LEVY; ROLAND LEY; SUZANNE RHULEN LOUGHLIN; GEORGE C. LYMAN, JR.; CHARLES P. LYON; MICHAEL L. MCDERMOTT; ROBERT T. MCINERNY; ARTHUR G. MICHELS; WALTER P. MUSKAT; WALTER W. MUSKAT; A. D. PISTILLI; ROBERT A. POSNER; JUDSON P. REIS; HARRY W. RHULEN; WALTER A. RHULEN; J. O. RICKE; E. JOY ROSE; MARK S. ROSE; A. F. SMITH; OWN B. TABOR; ALLEN M. TAYLOR; TRUDE C. TAYLOR; KARL ARONSON; JOAN R. FARROW AND JONATHAN M. FARROW FOR THE ESTATE OF JESSE M. FARROW; JACK FLECK; MARILYN FRANCKX; ISABEL L. GALLAGHER; JENNIFER A. GALLAGHER; MARY CLAIR GALLAGHER; ROBERT E. GALLAGHER; ROBERT E. GALLAGHER, JR.; THOMAS J. GALLAGHER; THOMAS H. GREEN; HENRY G. HAGER; THORNTON HUTCHINS; VINCE A. KONEN; C. C. LUCAS; HERBERT A. MIDDENDORFF; ROBERT S. DENEBEIM;

DANA FISHER, SR.; WILLIAM ALEXANDER FLORENCE; ANNE M. GALLEGHER; J. PATRICK GALLAGHER; MARK E. GALLAGHER; MARY CLAIRE GALLAGHER AS EXECUTRIX FOR JOHN P. GALLAGHER; KATHERINE GALLAGHER GOESE; ALLEN S. GREEN; ROBERT W. HATCH; MARY CLAIR G. JOHNSON; THOMAS V. LEEDS; GUY A. MAIN; EUGENE F. MIDDLEKAMP; MICHAEL MONTANA; BARBARA H. PISANI; RICHARD B. SANDERS; JACK R. TAYLOR; KEN NOACK; ROBERT L. PISANI; LARRY D. STROUP; NEVILLE G. WILLIAMS,

Plaintiffs-Appellees,

versus

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a Society and Council of Lloyd's; COUNCIL OF LLOYD'S

Defendants-Appellants,

and

EQUITAS HOLDINGS LIMITED; EQUITAS REINSURANCE LIMITED; EQUITAS LIMITED, a/k/a Equitas or Equitas Group,

Defendants.

ORDER

On August 30, 1996, appellees filed an emergency motion for reconsideration and suggestion for rehearing en banc. On September 9, 1996, appellees filed a motion for leave to file a supplement to this motion and suggestion. The panel grants the motion to supplement.

As the panel considered the emergency motion for reconsideration and is of the opinion that it should be denied, and

As no member of this court requested a poll on the suggestion for rehearing en banc,

It is ordered that appellees' emergency motion for reconsideration and suggestion for rehearing en banc are denied.

Entered for a quorum of the panel at the direction of Judge Michael with the concurrence of Judge Motz.

For the Court,

/s/ Patricia S. Connor

Acting Clerk

APPENDIX F

FILED:
September 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2158
CA-96-522

LOUIS F. ALLEN; CARL K. BAKER; JOYCE P. BAKER; PETER D. BERRINGTON; OLIVER BIRCKHEAD; FLORENCE BLAUSTEIN, MARY L. BRAY; T. K. BROOKER; DONALD J. BROOKS; JOSEPH CALLAGHAN; JAMES CASSEL; TERRY G. CHAPMAN; J. A. CLAWSON; JOHN K. COLVIN; FRED B. COX; JOHN RAWLYN CHARLES CRABTREE; CHRISTOPHER P. CLUP; GORDON C. DAVIDSON; RUTHERFORD DAY; DONALD D. DOTY; M. D. A. EMBLIN; AUDREY FISHER; DONALD B. GIMBEL; KENNETH J. GIMBEL; KATHERINE GOOCH; B. G. HARRISON; YUMIKO HONDA; HERBERT W. HOOVER, III; MARGARET W. JONES; DONALD K. KENT; E. R. KINNEBREW, III; WALTER J. LEVY; ROLAND LEY; SUZANNE RHULEN LOUGHLIN; GEORGE C. LYMAN, JR.; CHARLES P. LYON; MICHAEL L. MCDERMOTT; ROBERT T. MCINERNY; ARTHUR G. MICHELS; WALTER P. MUSKAT; WALTER W. MUSKAT; A. D. PISTILLI; ROBERT A. POSNER; JUDSON P. REIS; HARRY W. RHULEN; WALTER A. RHULEN; J. O. RICKE; E. JOY ROSE; MARK S. ROSE; A. F. SMITH; OWEN B. TABOR; ALLEN M. TAYLOR; TRUDE C. TAYLOR; KARL ARONSON; JOAN R. FARROW AND JONATHAN M. FARROW FOR THE ESTATE OF JESSE M. FARROW; JACK FLECK; MARILYN FRANCKX; ISABEL L. GALLAGHER; JENNIFER A. GALLAGHER; MARY CLAIR GALLAGHER; ROBERT E. GALLAGHER; ROBERT E. GALLAGHER, JR.; THOMAS J. GALLAGHER; THOMAS H. GREEN; HENRY G. HAGER; THORNTON HUTCHINS; VINCE A. KONEN; C. C. LUCAS; HERBERT A. MIDDENDORFF; ROBERT S. DENEBEIM;

DANA FISHER, SR.; WILLIAM ALEXANDER FLORENCE; ANNE M. GALLEGHER; J. PATRICK GALLAGHER; MARK E. GALLAGHER; MARY CLAIRE GALLAGHER AS EXECUTRIX FOR JOHN P. GALLAGHER; KATHERINE GALLAGHER GOESE; ALLEN S. GREEN; ROBERT W. HATCH; MARY CLAIR G. JOHNSON; THOMAS V. LEEDS; GUY A. MAIN; EUGENE F. MIDDLEKAMP; MICHAEL MONTANA; BARBARA H. PISANI; RICHARD B. SANDERS; JACK R. TAYLOR; KEN NOACK; ROBERT L. PISANI; LARRY D. STROUP; NEVILLE G. WILLIAMS,

Plaintiffs-Appellees,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a Society and Council of Lloyd's; COUNCIL OF LLOYD'S

Defendants-Appellants,

and

EQUITAS HOLDINGS LIMITED; EQUITAS REINSURANCE LIMITED; EQUITAS LIMITED, a/k/a Equitas or Equitas Group,

Defendants.

ASSOCIATION OF LLOYD'S MEMBERS; GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND; NATIONAL ASSOCIATION OF INSURANCE BROKERS; CALIFORNIA INSURANCE COMMISSIONER,

Amici Curiae

ORDER

Appellees have filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

For the Court,

/s/ Patricia S. Connor

ACTING CLERK

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

3:96CV522

LOUIS F. ALLEN, CARL K. BAKER, JOYCE P. BAKER, PETER D. BERRINGTON, OLIVER BIRCKHEAD, FLORENCE BLAUSTEIN, MARY L. BRAY, T. K. BROOKER, DONALD J. BROOKS, JOSEPH CALLAGHAN, JAMES CASSEL, TERRY G. CHAPMAN, J. A. CLAWSON, JOHN K. COLVIN, FRED B. COX, JOHN RAWLYN CHARLES CRABTREE, CHRISTOPHER P. CULP, GORDON C. DAVIDSON, RUTHERFORD DAY, DONALD D. DOTY, M.D.A. EMBLIN, AUDREY FISHER, DONALD B. GIMBEL, KENNETH J. GIMBEL, KATHERINE GOOCH, B. G. HARRISON, YUMIKO HONDA, HERBERT W. HOOVER, III, MARGARET W. JONES, DONALD K. KENT, E. R. KINNEBREW, III, WALTER J. LEVY, ROLAND LEY, SUZANNE RHULEN LOUGHLIN, GEORGE C. LYMAN, JR., CHARLES P. LYON, MICHAEL L. MCDERMOTT, ROBERT T. MCINERNY, ARTHUR G. MICHELS, WALTER P. MUSKAT, WALTER W. MUSKAT, A. D. PISTILLI, ROBERT A. POSNER, JUDSON P. REIS, HARRY W. RHULEN, WALTER A. RHULEN, J. O. RICKE, E. JOY ROSE, MARK S. ROSE, A. F. SMITH, OWEN B. TABOR, ALLEN M. TAYLOR, TRUDE C. TAYLOR, KARL ARONSON, ROBERT S. DENEBEIM, JOAN R. FARROW, JOAN R. FARROW FOR THE ESTATE OF JESSE M. FARROW, JONATHAN M. FARROW, DANA FISHER, SR., JACK FLECK, WILLIAM ALEXANDER FLORENCE, MARILYN FRANCKX, ANNE M. GALLAGHER, ISABEL L. GALLAGHER, J. PATRICK GALLAGHER, JENNIFER A. GALLAGHER, MARK E. GALLAGHER, MARY CLAIRE GALLAGHER, MARY CLAIRE GALLAGHER AS EXECUTRIX FOR ESTATE OF JOHN P. GALLAGHER, ROBERT E. GALLAGHER, ROBERT E. GALLAGHER, JR., THOMAS J. GALLAGHER, KATHERINE

GALLAGHER GOESE, THOMAS H. GREEN, ALLEN S. GREENE, HENRY G. HAGER, ROBERT W. HATCH, THORNTON HUTCHINS, MARY CLAIRE G. JOHNSON, VINCE A. KONEN, THOMAS V. LEEDS, C.C. LUCAS, GUY A. MAIN, HERBERT A. MIDDENDORFF, EUGENE F. MIDDLEKAMP, MICHAEL MONTANA, KEN NOACK, BARBARA H. PISANI, ROBERT L. PISANI, RICHARD B. SANDERS, LARRY D. STROUP, JACK R. TAYLOR, AND NEVILLE G. WILLIAMS,
Plaintiffs,

-against-

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a SOCIETY AND COUNCIL OF LLOYD'S; and COUNCIL OF LLOYD'S,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendants, The Corporation of Lloyd's a/k/a Society and Council of Lloyd's; Council of Lloyd's, hereby appeal to the United States Court of Appeals, for the Fourth Circuit from the Order of The Honorable Robert E. Payne entered in this action August 23, 1996 granting a preliminary injunction.

The Injunction issued by the District Court should be stayed pending appeal of this matter.

THE CORPORATION OF LLOYD'S a/k/a SOCIETY AND COUNCIL OF LLOYD'S: AND COUNCIL OF LLOYD'S
By: Warren E. Zirkle
Of Counsel

Henry H. McVey (VSB # 5670)
Warren E. Zirkle (VSB # 15321)
Charles M. Sims (VSB # 35845)
MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Harvey L. Pitt
Michael H. Rauch
Bonnie Steingart
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
One New York Plaza
New York, New York 10004
(212) 859-8000

Cynthia T. Andreason
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 986-8000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Notice of Appeal was sent by hand and regular mail to:

Conrad M. Shumadine, Esq.
Walter D. Kelly, Jr., Esq.
Willcox & Savage
1800 NationsBank Center
Norfolk, Virginia 23510-2197

A. Stephens Clay, Esq.
Kirkpatrick & Cody
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309

Eric Summergard, Esq.
Principal Assistant General Counsel
Securities and Exchange Commission
450 5th Street, N.W. (Stop 6-6)
Washington, D.C. 20549

/s/ Warren E. Zirkle